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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NEW ENGLAND MOTOR RATE BUREAU, INC., ET AL., and ACME FAST FREIGHT, INC., ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal From the United States District Court for the District of Massachusetts

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v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal From the United States District Court for the District of Massachusetts

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JURISDICTIONAL STATEMENT

Appellants, New England Motor Rate Bureau, Inc.; American Trucking Associations, Inc.; Regular Common Carrier Conference; National Motor Freight Traffic Association, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Ohio Motor Freight Tariff Committee, Inc.; Middle Atlantic Conference; Middlewest

Motor Freight Bureau; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference; Southwestern Motor Freight Bureau, Inc.; Acme Fast Freight, Inc.; International Forwarding Co.; Lone Star Package Car Company; Merchants Shippers; National Carloading Corporation; Pacific and Atlantic Shippers, Inc.; Republic Carloading & Distributing Co., Inc.; Springmeier Shipping Company, Inc.; Star System, Inc.; Texas Freight Company, Inc.; Universal Carloading & Distributing Co., Inc.; Western Carloading Co., Inc.; Westland Forwarding Co.; and Yellow Forwarding Co., appeal from the judgment of the United States District Court for the District of Massachusetts entered on May 31, 1966, dismissing their complaints to set aside a report and order of the Interstate Commerce Commission and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 254 F. Supp. 633 (adv. sheets) and copies of the opinion and judgment are attached hereto as Appendix A. A copy of the Interstate Commerce Commission's report and order in Docket No. 33977, *Freight, All Kinds, L.C.L., Container Charges—U.S.A.*, 323 I.C.C. 468 (1964) is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to enjoin and set aside the report and order of the Interstate Commerce Commission. (Appendix B) The judgment of the District Court was entered on May 31.

1966, and notice of appeal was filed in that Court on July 27, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The relevant provisions of the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001, and sections 5(1), 5(2)(b), 206, 207, and 208(a) of the Interstate Commerce Act, 49 U.S.C. §§ 5(1), 5(2)(b), 306, 307, and 308(a), are set forth verbatim in Appendix C.

QUESTIONS PRESENTED

1. Is the Interstate Commerce Commission free to vary the definition of express service and therefore the operating authority of the Railway Express Agency, in accordance with the issues in the administrative proceedings before it?

2. May the Railway Express Agency lawfully maintain a service so limited by tariff as to exclude articles which are expensive to transport, and, thereby, to publish in the same tariffs rates and charges for the aforesaid service which are the equivalent of freight rates rather than express rates?

3. So long as the Railway Express Agency maintains a transportation service which satisfies the criteria laid

down by the Commission as definitive of express service, is the Agency free to maintain a lower grade service at cheaper rates?

4. After having granted to Railway Express Agency virtually nation-wide motor carrier operating authority upon the premise that the limitation thereof to "express service" would prevent operation in freight service, is the Commission free to enlarge that operating scope so as to effectively remove the limitation without a showing of public convenience and necessity?

5. Is the Congressional policy against entry by the railroads into the motor-carrier field of transportation to be frustrated by permitting the Railway Express Agency, a railroad subsidiary holding virtually nation-wide motor carrier operating rights, to transmute its character from that of an exclusively express carrier to that of a general freight carrier?

STATEMENT

By tariffs filed to become effective January 12, 1962, Railway Express Agency, Inc., published charges applicable to the transportation of up to 2,500 pounds of freight when loaded by the shipper into containers specifically designed for use in such an operation. By the provisions of those tariffs, however, certain commodities were not to be included in the container load, among them being articles requiring protection from heat or cold. The new container charges were and are either at or below the charges made by the motor carriers for transportation of the same commodities in ordinary freight service. The normal or traditional charges of Railway Express were and are much higher than the container charges and include protection against excessive heat or cold.

In a report served July 26, 1963, the Hearing Examiner found the container rates to be unlawful because they applied to transportation which Railway Express Agency, Inc., is not authorized to perform. (Appendix B, p. 16a) After oral argument, which was opened to interested persons whether or not previously parties to the proceeding, the Commission entered its report and order dated October 19, 1964. (Appendix B). In that decision, the Commission stated that the primary issue to be resolved is "whether an express company may transport at nonpremium rates traffic which is not shown to move more expeditiously than in ordinary less-than-truckload freight service or to require any special handling or protection." (Appendix B, p. 17a)

In reversing the Hearing Examiner's conclusion that the container charges are unlawful because they apply to a non-express service, the Commission promulgated a formulistic definition of express service which consists of five controlling criteria in substitution for the traditional concepts of expedited handling, care, and transportation of perishable, fragile, or valuable articles, to which it had previously consistently adhered. (Appendix B, pp. 21a, 25a).

In *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1 (1960) at page 6, this Court said:

> "Both the Commission and this Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor carrier field."

For many years past, motor carrier and freight forwarder interests have been aware of the possibility of the entry of the railroads into the motor carrier

field through the doorway of the Railway Express Agency. That railroad subsidiary has, through numerous applications to the Commission, been granted motor carrier operating rights of a size and scope which exceed those held by any motor carrier of freight. In general, these grants to the Railway Express Agency, however, have authorized operation only in express service as distinguished from the transportation of general freight. Such restriction was a deliberate policy of the Commission as evidenced by its report in *Railway Express Agency, Inc., Extension—Charlottesville,* 94 M.C.C. 62 (1963), in which at pages 76 and 77, the Commission said:

> "* * * [P]rotestants * * * have given expression * * * to considerable apprehension that the Commission in granting authority to REA is giving birth to a nationwide railroad-controlled motor carrier which would be fully competitive with general freight carriers, * * *.
>
> "* * * Protestants may rest assured, * * *, that we shall continue to scrutinize REA's operations with a view to forestalling any developments which threaten to change the character of the services provided by it to the serious detriment of other carriers. * * *"

In the case at bar, the Commission declined to apply the policy it had promised in the *Charlottesville* and similar cases and, even more important, it declined to apply in this rate case the standard for distinguishing between express and freight service which it had adopted and applied in the operating rights cases.

Because they viewed such inconsistent administration of the Interstate Commerce Act as a virtual invita-

tion to Railway Express to invade the field of motor carriage of general freight, these appellants, on April 26, 1965, and June 25, 1965, filed their complaint and intervening complaint in the United States District Court for the District of Massachusetts in Civil Action No. 65-307-C, seeking to have the Commission's report and order set aside and annulled. On May 31, 1966, the court entered its opinion and judgment (Appendix A) dismissing appellants' complaint.

The opinion of the court below rests upon three basic conclusions which these appellants believe to be without warrant in law. They are:

1. The Interstate Commerce Commission is not bound by the definition of express service it has heretofore used.

2. Nothing in the definition of express service prohibits the publication of rates applicable only to a limited category of shipments or service.

3. So long as Railway Express holds out a transportation service which satisfies the criteria laid down as definitive of express service, Railway Express is free to maintain cheaper rates applicable to a lower grade of service.

The foregoing conclusions of the court below are drawn in issue on this appeal by the first three questions submitted for resolution. The remaining two questions epitomize the importance of the case. They ask (1) whether the scope of the motor-carrier authority of Railway Express, once granted on a restricted basis, can thereafter be broadened and enlarged by interpretation without proof of a requirement therefor by

the public convenience and necessity, and (2) whether the long-standing Congressional policy against unlimited entry into the motor-carrier field by the railroads shall be eroded by relaxation of the criteria and standards under which the Interstate Commerce Act has heretofore been administered.

THE QUESTIONS ARE SUBSTANTIAL

There can be no doubt that the Congressional policy against unlimited entry by the railroads into motor carrier operation, as recognized by the Court in the *American Trucking Associations* case, *supra,* still stands. No other view is consistent with the Congressional action which, by amendment to the Interstate Commerce Act,[1] has promoted and encouraged competition between and among the *separate* modes of transportation. This Court has had occasion to review the decisions of the Commission in which reliance had been placed upon such amendments, *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.,* 372 U.S. 744 (1963). Had it not been the intent of Congress that the integrity of the distinction between the separate modes of transport should be preserved, there would have been no occasion for amending the Interstate Commerce Act to permit a greater degree of inter-modal competition. The common interests stemming from participating in more than one mode would render such inter-modal competition meaningless.

There can also be no doubt that if Railway Express is free to enter the field of freight transportation by publishing freight rates in express tariffs, the rail-

[1] Section 15a(3), 49 USC 15a(3).

roads have, ready to their hand, the means of defeating in its entirety the Congressional policy against railroad invasion of the motor carrier field. This is so because Railway Express is today the nation's largest motor carrier from the standpoint of route miles. Heretofore, its operations over its vast network of routes has been in the performance of express service, but the Commission and the court below have held that so long as Railway Express maintains a true express service, for which it publishes express rates, it is free to offer also a lower grade service, less costly to perform, and to make applicable to that service rates which reflect the operational savings which stem from its lower grade character. Obviously, the net result of the holdings is to permit Railway Express to engage in the carriage of freight at freight rates.

Wholly apart from the fact that the practical effect of the holdings of the Commission and the court below would be to frustrate a Congressional policy of long standing, the comment of the court below that it sees no reason why the Commission should be bound by the traditional definition of express which the court itself had approved in *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (1963), aff'd *per curiam*, 376 U.S. 514 (1964), is a startling philosophy which is dangerous in the extreme. The traditional definition of express service had been relied upon by the Commission to distinguish from ordinary freight service the operations it had authorized Railway Express to institute pursuant to the finding of a requirement by the public convenience and necessity for *express service*. In *Railway Express Agency, Inc., Extension—Nashua, N. H.*, 91 M.C.C. 311 (1962), which was affirmed in *Auclair Transportation, supra*, and in many others, the

Commission had found that the existing motor carriers of freight were not providing express service over the routes sought by Railway Express. It thereupon issued a certificate to Railway Express authorizing it to operate as a motor carrier in the transportation of express. By the very dogma of each such case, Railway Express was thereby restricted to transporting express and prohibited from transporting freight. *There was a distinction made, and it was incorporated into the operating authority as a limiting restriction.* To permit that distinction to be rendered meaningless by an exercise in semantics is to abandon a basic principle of justice. A thing is not flesh one day and fowl the next because its environment has been changed. From the standpoint, then, of propriety of the actions of administrative agencies generally, the questions presented by this case are of prime importance.

The questions presented by this appeal are of extraordinary importance to the motor-carrier industry at large and to the freight forwarding industry. The motor carrier industry was brought under Federal regulation more than three decades ago. [49 U.S.C. 301 *et seq.*] Among the primary provisions of the regulatory legislation were those relating to the limited right of entry into the regulated service. While the right of then-existing carriers to continue their "grandfather" operations was zealously protected, *United States* v. *Carolina Freight Carriers, Inc.*, 315 U.S. 475 (1942), new operations could be commenced only upon proof of a requirement therefor by the public convenience and necessity. 49 U.S.C. §§ 303(c), 307; *Pan-American Bus Lines Operation,* 1 M.C.C. 190, 201 (1936). See also *Hudson Transit Lines* v. *United States,* 82 F. Supp. 153, 157 (1948), aff'd *per curiam,*

338 U.S. 802 (1949). Accordingly, each certificate issued by the Commission to authorize the operation of a motor-carrier service was carefully worded so as not only to authorize but also to limit the operations for which a legal basis had been laid. 49 U.S.C. §§ 307, 308. It was for the precise purpose of both authorizing and limiting the motor-carrier operations of Railway Express that the certificates granted to it described its operations as transportation of property *"in express service."*

There can be no doubt, whatever, that the meaning of the phrase "in express service" was intended by the Commission to proscribe operation by Railway Express in the transportation of general freight. Indeed the Commission went out of its way to assure the motor carriers generally that there would be no subsequent expansion of operating scope, saying that it had "consistently recognized certain fundamental differences between express service and ordinary freight service * * *." *Railway Express Agency, Inc., Extension—Durant-Kosciusko,* 34 M.C.C. 111, 114 (1942). In *Railway Express Agency, Inc., Extension —Madison, Wis.,* 94 M.C.C. 677, 681 (1964), the Commission stated that these differences have persuaded it to conclude "that a proposed line-haul motor movement of express by [Railway Express] will not present any substantial threat of undue competition with the operations of independent common carriers conducted generally at lower rates." See also *Railway Express Agency, Inc., Ext.—West Unity-Middletown,* 31 M.C.C. 363, 371 (1941); *Railway Express Agency, Inc., Extension—Charlottesville, supra; Railway Express Agency, Inc., Extension—Great Falls, S. C.,* 94 M.C.C. 102, 106 (1963).

Solemn though its assurances to the motor carriers had been, the Commission has done exactly what it said it would not do and has interpreted the phrase "in express service" as authorizing the transportation of general freight. Thereby the Commission has rendered nugatory, insofar as Railway Express is concerned, those provisions of the Interstate Commerce Act which require a showing of public convenience and necessity before a new motor-carrier service is authorized. That might not be so bad were it not for the fact that the motor-carrier certificates granted to Railway Express are numbered literally in the hundreds——And the effect of the Commission's change of definition is to authorize a new operation in the transportation of general freight over virtually the entire nation. The effect upon the motor-carrier industry as a whole cannot even be gauged. By the same token, a definition of express service permitting Railway Express to transport general freight will introduce substantial new competition for the existing freight forwarders as well.

CONCLUSION

The questions presented by this appeal are of substantial public importance, and warrant plenary consideration by this Court upon briefs and oral argument. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be

reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 65-30-C

NEW ENGLAND MOTOR RATE BUREAU, INC., *et al.*, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*.

Opinion

May 31, 1966

Before ALDRICH, *Circuit Judge*, GIGNOUX and CAFFREY, *District Judges*.

ALDRICH, *Circuit Judge*. This is an action to set aside an order of the Interstate Commerce Commission approving a rate schedule filed by Railway Express Agency, REA, for container traffic, so-called, between thirty-five stated cities in the United States. The rate was approved by the full Commission. Freight, All Kinds, L.C.L. Container Charges,—U.S.A., 1964, 323 I.C.C. 468.[1] The plaintiffs, original and by way of intervention, are representatives of motor freight carriers and freight forwarders, and are proper parties to prosecute this proceeding. Their fundamental objection is that container service is not true express service, and therefore impermissible for REA as an express carrier.

Container service is elaborately described in the Commission's opinion, but, briefly, involves a special low rate for transporting a container of a fixed capacity (101 cubic feet) which the shipper may load with any number of

[1] One commissioner filed a separate concurring opinion, and two did not participate.

articles so long as the total weight does not exceed 3,000 pounds. The charge is on the basis of a 2,500 pound minimum, and does not depend on the nature of the lading. No special protection from heat or cold, or against theft, is provided, and a few enumerated types of articles, consequently, are not taken. REA furnishes the container, but makes a charge for excessive retention thereof. There is an additional charge, if the lading is to be distributed at destination for separate local delivery.

Although the container rate was found to be fully compensatory, the resulting economies enable REA to charge considerably less in some instances than motor freight carriers for essentially competing service. This is the rub.

We consider preliminarily the two points with which REA commences its brief. The President's Transportation Message to Congress of April 4, 1963, urging diminished regulation, experimentation, and "new kinds and combinations of service," cannot enlarge the statutory authority granted REA, or any other carrier. Nor can the meaning of that authority depend upon REA's financial circumstances. If REA is unable to survive on express business alone, this fact cannot create rights which it would not otherwise have. The Commission did speak of REA's financial need. We do not believe, however, that either of these factors was a basis for its decision that the container service was express service.

Plaintiffs argue that the Commission has rejected the "classic" definition of "express service"[2] and substituted

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[2] Plaintiffs give as one example of a definition "in classic terms" the one set out in *Transportation Activities of Arrowhead Freight Lines, Ltd.*, 1952, 61 M.C.C. 131, 140. "Essentially express service is a method of transportation by which shipments receive greater care, security, and faster transportation than are accorded ordinary freight either by the same carrier or by other like carriers generally. Express service also involves the idea of regularity as to route, or time, or both. *Retzer* v. *Wood*, 109 U.S. 185, 27 L. ed.

five criteria first set forth in the second *Arrowhead* decision, *Transportation Activities of Arrowhead Freight Lines, Ltd.*, 1955, 63 M.C.C. 573, 581-82.[3] These criteria appear to have been intended not as a change in the definition of express service, but as a refinement of the more general definition, making it clearer and more precise. With the difference that the five factors do not include premium charges, a matter to be discussed below, they depart from the former definition in no significant aspect. Plaintiffs seem to suggest that since we "approved" a particular version of the traditional definition in *Auclair Transportation, Inc.* v. *United States*, D. Mass., 1963, 221

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900. It is a premium service utilized mainly when conditions, generally at point of delivery, make its use by the shipper economically feasible despite relatively higher transportation costs. Because express service is marked by an undertaking to provide transportation services superior to that normally required and furnished for ordinary freight, it is both appropriate and proper that relative [*sic*] higher charges should be established for it."

[3] "Succinctly stated the rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and, (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay."

F. Supp. 328, *aff'd per curiam,* 376 U.S. 514, the Commission was thereafter bound by it. In *Auclair* we were not asked to choose between one defintion and another. We quoted the definition set out by the Commission in the report under review, but the case did not involve any inquiry into its details. We see no reason why the Commission should be bound by the exact words it once used.

Plaintiffs contend that even under the five criteria, the container tariff is inconsistent with REA's authority as an express carrier. This calls for a brief analysis. Criteria (1) and (2), fn. 3, *supra,* are closely related. (1) is that an express agency must "transport any commodity which may be safely transported in ordinary van-type equipment." Although, as previously mentioned, REA excepts certain items from its container service tariff, it holds itself out to transport the excepted items under its other tariffs. (2) is that it must provide such care and security as the commodity may require. Contrary to plaintiff's intimations that commodities not demanding special treatment are within the exclusive domain of freight carriers, REA would certainly fail in its obligations if it refused to carry goods because they were not valuable or did not require special care.

Criterion (3) is that all shipments be handled with equal expedition from point of pickup to point of delivery. Plaintiffs do not contend that, once the container is in REA's hands, it is transported less expeditiously than other express shipments. Plaintiffs do argue, however, that REA fails to meet this criterion because the shipper has 48 hours free use of the container before and after shipment. We cannot agree. Obviously, it takes little time to load the container. The shipper's independent decision when to initiate the shipment cannot be imputed to the carrier if, as is the case, the carrier is willing and able to pick up, transport, and deliver the lading expeditiously on being called upon to do so. Any shipper of a single article, or of many articles in his own container, has an equal option.

As for criterion (4), plaintiffs do not contend that REA's transportation of the containers does not follow firmly fixed schedules, with fixed delivery times. And, although the meaning of criterion (5)'s "relatively simple billing [and] rate structures" is not entirely clear, there is no suggestion that REA's rate structure is not simple, even with this added tariff.

What plaintiffs' case really boils down to is that they would add a sixth factor. They point to the fact that the Commission and this court, *Auclair Transportation, Inc.* v. *United States, supra,* have stated that express service "usually" involves "premium rates." Rates, however, are only a result of the costs involved in transporting the commodities. If a premium charge is a frequent manifestation of express service, it is not an inevitable one. When shipments are given special care or security, the transportation costs to the carrier are greater, and, correspondingly, the rates charged to the shipper may be higher. So long as the rates are compensatory we could not give determinative weight to their relatively low amount. Nor, within the limits that the rate structure remains simple, can we find any inconsistency in an express carrier charging rates that to some degree correspond to the special handling, *vel non,* given the shipment. Nothing in the historical definition of an express carrier obliges it to charge a single rate.

REA's container service may not represent the highest calibre of express service. The question, however, is one of degree, and one as to which we give considerable weight to the expertise of the Commission. Concededly, a service might be so far diminished as to cease to be an express service entirely. The Commission gives, as an example, service that is delayed in delivery. We agree that this would be a fundamental departure. But we also accept the Commission's analysis and conclusion that REA's container traffic did not fall beyond the bounds.

It may well be, as plaintiffs suggest, that freight service has improved to such an extent that the distinction between express and freight carriers is considerably less marked than it once was. However, the distinction is not without meaning. We agree with the Commission that it is not for the freight carriers' progress to determine the permissible bounds of express service by some process of elimination, or by a charge that express carriers' rates in some instances are highly competitive.

Plaintiffs' other contentions have been considered, but do not require comment. The complaint will be dismissed.

Judgment

May 31, 1966

In conformity with opinion of the Court filed this date, it is

ORDERED that the complaint herein be dismissed, with costs taxed at $

By the Court,
HOPE K. CONNELL
Deputy Clerk

BAILEY ALDRICH
Bailey Aldrich
Unites States Circuit Judge

EDWARD T. GIGNOUX
Edward T. Gignoux
United States District Judge

ANDREW A. CAFFREY
Andrew A. Caffrey
United States District Judge

APPENDIX B

Freight, All Kinds, L. C. L., Container Charges—U.S.A.

Decided October 19, 1964

Report and Order of the Commission on Oral Argument

WEBB, *Vice Chairman:*

Exceptions to the report and order recommended by the examiner were filed by respondent, by interveners in support of respondent, and by certain protestants. Replies to exceptions were filed by various parties. The parties were heard in oral argument, directed primarily to the scope of the respondent's operating authority under parts I and II of the Interstate Commerce Act. On the major point in issue, our conclusions differ from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective January 12, 1962, the respondent, REA Express, proposed to establish rates and charges, and rules, regulations, and practices affecting such rates and charges, applicable on freight, all kinds, less-than-carload, in containers, between 35 of the principal cities of United States, and from seven other origins to specified destinations.[1] Upon protest of individual motor carriers, motor carrier associations, freight forwarders, and certain railroads, the Commission, by order dated January 11, 1962, instituted an investigation into the lawfulness of the proposed schedules, but did not suspend them.

Evidence in support of the proposed rates was presented by respondent, and by numerous shippers and shipper or-

[1] Charges are also provided on glassware, in containers, from Corning, N.Y., to New York, N.Y. (Borough of Manhattan only), and on empty glassware containers in the reverse direction. The applicability of the proposed rates has since been expanded to some 250 cities in REA's Tariff 57A, ICC 8566.

ganizations. Opposing the rates were motor carriers, certain rail carriers, and freight forwarders. Respondent and protestants stipulated that data relating to the railroad line-haul costs developed in two pending proceedings[2] for the handling of respondent's less-than-carload express traffic might be considered.

No exceptions were taken to the examiner's statement of facts, which statement we find to be correct in all material respects. Our restatement of the facts will be limited to those deemed necessary for a clear understanding of the issues.

The container charges are applicable to the movement of all types of commodities, in straight or mixed shipments, with the following exceptions:

1. Articles requiring protection from heat or cold;
2. Live creatures;
3. Articles named in the money classification;
4. Articles the movement of which is prohibited in express service by governing tariffs; and
5. Human remains.

The containers used by REA have a maximum inside capacity of 101 cubic feet. Because of the capacity limit of the forklift equipment generally in use at respondent's terminals, the tariff imposes a maximum safe loading limit of 3,000 pounds. When the weight of the lading does not exceed 2,500 pounds, a flat charge is assessed for the transportation of the loader container. An additional charge is assessed for each 100 pounds or fraction thereof in excess of 2,500 pounds. If a consignor tenders a shipment of more than one container at the same time and place for

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[2] I. and S. Docket No. 7644, Men's & Boys' Outerwear—Bruceton, Tenn., to U.S.A., and Docket No. 33918, Phonograph Records or Jackets—REA—Richmond, Ind., to U.S.A.

delivery to one consignee at the same destination, the charge for the second and each subsequent container is, depending upon the length of the haul, about 95 to 97 percent of the charge for the first container. For example, the flat charges for a single or first container, on all-freight shipments up to and including 2,500 pounds, range from $20 from Rochester to Buffalo, N. Y., to $173 from Littleton, N.H., to Los Angeles, Calif. Charges for any additional containers are $19 and $168, respectively, or a discount of $1 and $5 per container. The charges for the excess over 2,500 and up to 3,000 pounds in a container range from $1 to $6 per 100 pounds or any fraction thereof, the level again depending upon the distance involved.

By consigning a container to respondent's agent, the proposed schedules permit split delivery service on prepaid shipments to no more than 10 consignees located within prescribed limits of a destinaiton city. The principal split delivery address is the one to which the greatest number of pieces in a container are destined. The container must be loaded so that these pieces can be removed last. While no extra charge is made for the latter service, there is a charge per piece for the others. This charge varies in accordance with the weight and number of pieces to be delivered at each address. For example: For the first and heaviest piece, $1, if 300 pounds or less, and $1.65, if over 300 pounds; for each additional piece delivered at the same address, 25 cents from 1 to 75 pounds, 50 cents from 76 to 150 pounds, 75 cents from 151 to 300 pounds, and $1.20 for over 300 pounds. Split delivery service and the charges therefor cover and apply only to the movement of shipments in single containers. The tariff expressly excludes from the previously described multiple-container discount provision shipments subject to split deliveries.

The indicated rates and charges apply to containers supplied by REA with a maximum of 48 hours free time to

allow loading by the shipper or unloading by the receiver. Beyond such free time, a detention charge of 75 cents per container for each 24 hours is assessed. Respondent's purpose is to have sufficient containers available to facilitate the handling of all traffic offered to it under the proposed schedules. To assure the shipping public the opportunity of using the rates during peak demands and to permit their utilization for specialized movements, the rates apply also to shipper-furnished containers.

The flat container charges, as noted by the examiner, are related to the less-than-truckload motor carrier class rates between the involved principal points. They generally reflect the approximate equivalent of motor charges for the transportation of a class 55 shipment weighing 2,300 pounds. The following table depicts the motor carrier class basis, used by REA to indicate the pattern of the container charges, and the related probable weight and density of the lading:

Class (percentage of first class)	*Weight* (pounds)	*Density* (pounds per cubic foot)
50	2,500	25
55	2,300	23
60	2,100	21
70	1,800	18
85	1,500	15
100	1,300	13
150	800	8
200	600	6

As noted above, additional charges are assessed on the excess over 2,500 pounds. The class 50 less-than-truckload charges thus serves, in effect, as a minimum charge, regardless of the density of the traffic. The respondent maintains that the density evaluations are conservative in view of the fact that part of the theoretical stowage space of the container might be lost due to the incompatibility of package sizes and shapes with the dimensions of the con-

tainer. A loadability factor of 80 percent of the cubic capacity is anticipated.

Among the advantages derived from containerization of freight are the following:

> The avoidance of multiple handling of individual pieces and expensive packaging;
>
> The elimination of detailed checking, record keeping, and billing;
>
> The reduction in claims involving loss, damage, and pilferage; and
>
> The simplification of tariff search and application, making rate ascertainment less costly and more convenient.

Although REA handles shipments of various sizes ranging from about 20 pounds up to carloads of certain perishable commodities, its principal traffic consists of small shipments averaging about 50 pounds. Approximately 93 percent of the total number of shipments, representing 64 percent of the total tonnage and 75 percent of REA's total revenue, consists of shipments weighing 100 pounds or less. Almost 50 percent of REA's traffic moves at its first and second class rates or multiples of first class which generally are higher than the comparable motor carrier class rates; about 35 percent moves on commodity rates, covering such articles as printed matter, wearing apparel, shoes, drugs, auto parts, freight moving on Government bills of lading, and cut flowers, all of which are rated at or above the motor carrier general average of class 70 for less-than-truckload traffic; and only about 9 percent consists of miscellaneous commodities, some of which are rated below the indicated general motor carrier average classification. REA estimates that on an overall basis its traffic would be rated above the motor carrier average rating of class 100. However, respondent has derived

revenues averaging $3.95 for shipments up to 50 pounds, $4.75 for shipments from 50 to 100 pounds, and $5.27 for all shipments. All of these amounts are less than the minimum charges which would be assessed per shipment if this traffic were to move by motor carriers. But it should be pointed out that while motor carriers assume full liability on all shipments they transport, unless otherwise indicated in their tariffs, REA does not. As in all REA tariffs, the applicable tariff in the subject proceeding directs the shipper to the Official Express Classification, 36 I.C.C. 8200. Rule 13 of that Classification states:

> Rates published in tariffs governed by the Classification, except as to ordinary live stock, are dependent upon and vary with the declared or released value of the property, * * * and are based upon property declared to be of, or released to, a value not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual or billing weight for any shipment in excess of 100 pounds. When the declared or released value exceeds that above stated, the charges are 18 cents[3] greater for each $100 or fraction thereof in excess of the value stated above.

In 1960, almost 60 million shipments were handled by REA, with an average weight of 46.5 pounds. This was a reduction from 87 million shipments in 1950 when the average weight was about 61.5 pounds. During the 20-year period, from 1938 to 1958, REA's traffic declined from 1,480 to 1,197 million ton-miles. The 1958 volume amounted to only 80.9 percent of that handled in 1939, although by 1958 motor common carriers had increased their traffic volume over 1939 by 367.6 percent and the railroads by

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[3] Supplement 35 to the above Classification increases the charges to 23 cents except in eastern territory where the charge will be 25 cents. The initial charge was authorized in Released Rates Order No. 848 of March 1, 1929.

65.4 percent. In relation to all intercity freight traffic, respondent's share declined from 0.27 percent of the total in 1934 to only 0.1 percent in 1958. By contrast, the share of motor common carriers increased from 9.79 percent of the total in 1939 to 20.57 percent in 1959.

As a result of the increased competition from motor carriers for short-haul traffic and from freight forwarders for long-haul traffic, and the comparatively higher rates of respondent for what has come to be generally equivalent service, REA lost substantial less-than-carload traffic, particularly in the 2,000- to 3,000-pound weight bracket. Its general financial condition steadily deteriorated. For example, its operating deficits increased from an estimated $16 million in 1955 to $37.8 million in 1958. However, in 1959, a new standard agreement was concluded with the railroads and new management assumed control of the company. New operating and pricing policies were inaugurated. Since that time REA's position has improved to the point where in July 1962, it expected to show a modest net profit for the previous 12-month period.[4]

To achieve this result REA revamped its express operations and, with respect to less-than-truckload and less-than-carload merchandise, became a vigorous competitor of motor carriers and freight forwarders. Increasingly, the choice of shippers among the three types of carriers has been governed by the level of their rates. REA continues to provide a so-called premium service at premium rates where the traffic involved requires special handling in the interest of expedition or special protection. As the examiner found, however, this so-called premium service is available primarily only in connection with shipments by air or with respect to perishables and valuables. REA views its contemporary transportation role, essentially, as the performance, under single-carrier responsibility, of

[4] REA's annual report for 1962 shows a net income of about $6.3 million.

nationwide service on virtually every kind of freight which, regardless of the size, shape, density, weight or value, is moved with approximately the same degree of expedition. In general, respondent's underlying line-haul is performed by the railroads, predominantly in passenger trains, with only about 5 percent of its total intercity service being provided over the highway. The record fails to disclose specifically to what extent REA utilizes rail transportation for the line-haul movement of the container traffic in question and to what extent a part of such traffic is transported by REA over the highways in its own line-haul vehicles. It is clear, however, that REA is authorized by the Commission to transport a part of the involved container traffic in all-motor service if the traffic moves in "express service" within the meaning of REA's certificates.

At the time of the hearings, REA had not handled more than 200 containers in any one week, the average being about 150 per week. The greatest portion of this traffic moved within and from official territory. Generally, the traffic moved in containers furnished by REA. Most of the transportation was interplant in nature. Early in 1962, REA made a survey to test the operational and economic practicability of its proposal. Details of that survey, protestant's criticism thereof, and shipper experience with containerization are outlined in appendix A.

Disposition of Secondary Issues

The examiner found the rates to be compensatory. Set forth in appendix B is the basis for this finding. At oral argument the freight forwarder protestants agreed with the examiner's conclusion. In reaching that conclusion, the examiner assumed the validity of most of the objections registered by the protestants to the respondent's cost study. Since the record clearly shows that the container rates would enhance REA's earnings, it would serve no useful purpose to discuss the matter further. We conclude that the rates in issue are compensatory.

The examiner also found that the proposal does not violate the just and reasonable classification requirement of section 1(6). We agree. *Container Service,* 173 I.C.C. 377, 434, 445, Cf. *General Increases—Eastern Central Territory,* 316 I.C.C. 467; *Motor Vehicles from Kansas City to Ark., La., and Tex.,* 318 I.C.C. 301.

Also, the examiner found that under section 15a(3) and the national transportation policy, the assailed rates do not constitute a destructive competitive practice. We agree. The proposed rates are not unlawful merely because they threaten to divert traffic. In *Meats, Fruits, Vegetables—TOFC—Transcontinental,* 316 I.C.C. 585, 592, the Commission, division 2, observed that:

> "To compete is to strive for something which another is actively seeking and wishes to gain." *United States* v. *Union Pacific R. Co.,* 226 U.S. 61, 87 (1912). Competition thus implies action and change. Disapproval of proposed reduced rates could be just as destructive of competition as approval. Obviously, a policy of ratemaking based primarily on maintenance of the status quo would be the antithesis of competition.

In *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 759 (1963), the Supreme Court noted that:

> the setting of a rate at a particular level • • • [does not constitute] an unfair or destructive competitive practice simply because that rate would divert some or all of the traffic • • •.

The Supreme Court concluded that:

> If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from

> others, then the carrier is thwarted from asserting its own inherent advantages of cost * * *.

Here, the proposed rates would improve REA's revenue position. Protestants' costs are not shown. Such a showing is necessary to support protestants' claim that the involved rates constitute a destructive competitive practice. *Various Commodities from or to Arkansas and Texas,* 314 I.C.C. 215, cited with approval in *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co., supra,* at page 760.

Discussion and Conclusions

The principle argument of the protestants is that approval of REA's container rate concept would permit REA to expand its operations beyond the scope of its authority as an express company under part I of the act and beyond the authority conferred upon REA by certificates which limit its motor carrier service to general commodities moving "in express service."

The examiner condemned the proposed container rates solely on the ground that they applied to transportation which REA is not authorized to perform. In general, the examiner found that shipments weighing 500 pounds or less are prima facie express traffic but that, as to shipments weighing more than 500 pounds, REA failed to show that expedited service was required or that such shipments receive extra service or special handling because of their perishability, fragility, or value. Absent such a showing, the examiner concluded that the container rates applied to traffic which did not move in bona fide express service and that the involved rates therefore contemplated transportation beyond the scope of REA's authority as an express company.

While the examiner did not intend "to convey in any way the idea that containers, as such, cannot properly be

used," REA argues on exceptions that the effect of the examiner's findings is to make the use of containers impracticable; and that the 500-pound weight limitation would compel REA to curtail its operations. According to REA, the condemnation of its container rates by the Commission would demonstrate the inability of regulation to keep abreast of technological changes.

The motor carrier protestants recognize that technological advances have made it possible for them to provide transportation service which, in terms of expedition, would rival that of REA. They contend that, in legal contemplation, express companies exist merely to fill a transport void. Therefore, when improved motor carrier service narrows the difference, rate-wise and time-wise, between ordinary motor freight service and express service, REA, according to the protestants, must curtail its operations. At oral argument express service was described by counsel for certain motor carrier protestants as "a service that the motor carriers do not or are unwilling to or cannot feasibly render."

By using containers, which hold up to 3,000 pounds, REA could and would compete for some of the traffic presently transported by motor carriers and freight forwarders. The primary question to be resolved here is whether an express company may transport at nonpremium rates traffic which is not shown to move more expeditiously than in ordinary less-than-truckload freight service or to require any special handling or protection.

As previously mentioned, there is no specific evidence of record regarding the extent of intercity line-haul movements of loaded containers performed over the highway. However, it is clear that REA's motor carrier operating authority is sufficiently broad, territorially and commodity-wise, to be used for some of the movements in question, unless such movements are prohibited by the restriction in REA's certificates limiting the transportation of general

commodities to those moving "in express service." REA contends in this proceeding that it is authorized to perform the intercity transportation in question either by utilizing rail carriers or its own highway vehicles.

Authority granted to REA under part II of the act to transport "general commodities, moving in express service" may be regarded, at least for the purpose of this proceeding, as coextensive with its authority as an express company under section 1(3)(a) of the act. In the interest of brevity and clarity, the lawfulness of the assailed rates will be discussed primarily in light of the arguments that REA's highway certificates do or do not authorize the transportation in question. If such transportation is not "express service" within the meaning of REA's certificates, it would seem to follow, in the case of containers moved by rail, that a less-carload ordinary freight service is performed under part I without Commission approval of pooling arrangements between REA and the underlying rail carriers. The examiner so found.

More specifically, the basic issue in the proceeding is whether certificates limiting REA to the transportation of "general commodities, in express service" prohibit REA from carrying a particular type of *traffic* or whether they prohibit REA from performing a particular type of *service.* The examiner found that the rates apply to *traffic* which REA is not authorized to carry. We conclude that a highway express carrier of general commodities is not prohibited from handling any particular type of traffic nor required to publish any particular level of rates, but that an express carrier must move all the traffic it handles in express service, and may publish any level of rates for express service which is reasonably compensatory and otherwise lawful. This conclusion is supported by Commission precedent, by practical considerations of administration and enforcement of the act, and by the national transportation policy. A contrary conclusion, in our

opinion, would make it extremely difficult for REA to continue to provide a nationwide express service.

The Commission's leading case on the distinction between express service and general motor freight service is *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573 (1955). The *Arrowhead* case resulted from an investigation to determine whether certain operations of Arrowhead exceeded the scope of its authority to transport general commodities moving in express service. In the first report, the Commission, division 5, found that Arrowhead's unscheduled truckload and less-than-truckload operations constituted a general freight service rather than an express service. *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952). However, the Commission said at page 140:

> we cannot agree that the limitation of motor-carrier operations to express service prohibits per se the transportation of quantity shipments under any and all conditions.

On appeal, the Commission's cease and desist order was challenged as being unreasonably vague. The court agreed with Arrowhead that it was not possible to ascertain which of its unscheduled operations were interdicted and that the Commission's decision, at best, would support only an order dealing with Arrowhead's rates. *Arrowhead Freight Lines* v. *United States*, 114 F. Supp. 804 (S. D. Calif. 1953). In that connection, the court observed at page 813:

> the so-called "express carrier" finds it impossible to provide better equipment, and unlawful to provide faster service than motor carriers of "ordinary freight"; while motor carriers of "ordinary freight" are permitted to call themselves "express" carriers and to hold themselves out as providing "express service at freight rates."
>
> By a process of exclusion, then, we infer that the only criterion by which the Commission, or the car-

riers themselves, or any one else, can distinguish "ordinary freight" motor carriers from an "express" motor carrier is that the latter is expected to charge a higher rate for the same service.

If this deduction is sound, a motor carrier of "ordinary freight" is permitted to render an "express service at freight rates," but an "independent motor carrier of express" is only permitted to render like service at higher rates, i.e. "express service" at "express" rates.

On remand, the Commission was unable to accept the court's suggestion that it might be possible to dispose of the proceeding by entering a rate order. The Commission said, in effect, that the express rate level reflected the operating costs involved in providing express service, and that the generally higher level of express rates was not designed to protect general freight carriers from competition, but rather to compensate express carriers for providing additional or expedited service "under less favorable operating conditions than to carriers providing ordinary freight services." 63 M.C.C. at 582. Throughout its report, the Commission emphasized that the distinction it was drawing was between two types of transportation service. The five specific ultimate requirements for the rendition of a bona fide express service set forth in the second *Arrowhead* report and reproduced below do not support the proposition that express service can be differentiated from general freight service on the basis of particular traffic, a particular weight of shipment, or particular rates.

Such attributes of express service as the transportation of small shipments at premium rates are descriptive rather than limiting in nature. That is, if a true express service is held out to the public, most of the shipments attracted will weigh less than 500 pounds and the cost of moving

them expeditiousy will be greater than if they were held for aggregation into truckload lots. This means, of course, that the cost of providing express service for all traffic tendered necessarily must be recovered by a level of rates generally higher than that of carriers whose service is dictated or influenced by the economies to be derived from volume movements. In recognition of the considerations outlined above, the Commission laid down the followig five criteria in the *Arrowhead* case relative to the performance of highway express service:

> (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both;
>
> (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require;
>
> (3) to provide equally expeditious transportation and careful handling of all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery;
>
> (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public; and
>
> (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay. [63 M.C.C. at 581-582]

These are practical and concrete requirements intended for the guidance of carriers engaged in express service to assure that it remains bona fide. These succinctly articulated criteria, we hold, are controlling in defining express service.

It is clear that REA's operations satisfy the above criteria for express service. No party to this proceeding disputes that fact.[5] Furthermore, it is clear that the container traffic in question is moved by REA just as expeditiously as the traffic which the protestants describe as express traffic. The exclusion of certain specified articles from the application of the proposed rates is reasonable here since these commodities do not appear to lend themselves readily to movements by the described containers.

The *Arrowhead* case was recently reaffirmed by the Commission in *Railway Exp. Agency. Inc., Extension—Nashua, N. H.*, 91 M.C.C. 311, *aff'd Sub. nom., Auclair Transp. Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U.S. 514 (1964). Protestants in the *Nashua* case urged that a restriction be imposed in the certificate sought by REA which would limit it to the transportation of "comparatively small shipments for which, because of size, fragility, perishability, or value, the ordinary freight carriers are not providing the necessary speed, careful handling, and security." 91 M.C.C. at

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[5] W. T. Byrnes Motor Express, Inc., not previously a party of record, was permitted to appear and to present its views in oral argument. In oral argument, Byrnes alleged that at Watertown, N.Y., REA has spotted trailers at a shipper's platform for more than one day. These allegations are not supported by evidence of record and are apparently the subject of a pending complaint proceeding. We express no opinion regarding the merits of that proceeding. However, as made clear elsewhere in this report (see pages - , infra), REA is obliged, in accordance with the third test of the second report in the *Arrowhead* case, to provide equally expeditious transportation for all accepted shipments.

323, n. 19. The Commission refused to impose that restriction, stating at page 325 of its report:

> In the past, this Commission has avoided a restrictive commodity interpretation of express service even when such an interpretation has been requested by existing carriers of ordinary freight in order to allay their concern that REA's express service would overlap unduly their general freight operations. *West Unity—Middletown* case, *supra*. The *Arrowhead* and *Mistletoe* interpretations in no way conflict with this approach that recognizes the inherent error in interpreting "express" authority strictly from a commodity viewpoint.

At this point, we desire to make clear that our interpretation of "general commodities moving in express service" does not mean that all certificates hereafter issued to REA must confer authority to perform an unrestricted express type service. In considering applications by REA for extensions of authority, the Commission must tailor its grant to the need shown, even though the demonstrated need for service is less extensive than a complete "express service." Of course, the Commission is reluctant to impose upon REA or upon any other certificated carrier restrictions which are administratively undesirable or extremely difficult to enforce. See *New York Central R. Co.—Key Point Restrictions*, 79 M.C.C. 113, 120. However, we take this opportunity to reaffirm the following finding at page 325 of our report in the *Nashua* case:

> The *Arrowhead* and *Mistletoe* exclusions from "express" authority of liquid commodities, in tank vehicles, commodities requiring special equipment, and household goods are designed to be essentially a reflection of the true nonspecialized nature of express service, resulting in a limitation on the equipment which has been, and may properly today be used in

connection with operations conducted pursuant to authority to transport general commodities moving in express service.

We also wish to make clear that rejection, suspension, or condemnation of rates is appropriate where such rates apply to transportation beyond the publishing carrier's authority. In the case of REA, or any other express carrier, this means that the publication of rates applicable to delayed service which does not conform to the indicated criteria established in the second report in the *Arrowhead* case would not be lawful. The economies to be gained from providing such a delayed transportation service are available only to ordinary freight carriers.

The examiner's proposed definition of "express service" is not entirely clear. Apparently, the proposed definition would establish a conclusive presumption that shipments weighing 100, or possibly 300, pounds or less constitute express traffic; that shipments ranging in weight from 300, or possibly 100, pounds to 500 pounds are prima facie express traffic; and that all shipments, regardless of weight, may be considered to be express traffic if they are "shown to require expedited or special handling." Even if it seemed desirable to do so, there is no basis in this record for defining express service generally in terms of shipment size or weight. Historically, REA has handled shipments weighing in excess of 500 pounds, including carload shipments. See *Increased Express Rates and Charges, 1957*, 304 I.C.C. 699, 705, 725-727. In the recommended report in this proceeding, the examiner noted that "REA has lost substantial less-than-carload traffic, particularly in the medium range weight of about 2,000 to 3,000 pounds." Obviously, REA had no reason to believe that it was required to justify its container rates in terms of some arbitrary weight limit. To impose such an unexpected burden upon the respondent would be improper. Assuming, *arguendo*, that it would be desirable to define "express service"

in terms of a definite weight limit, the factual basis for such a limitation could be established only in a general investigation or ex parte proceeding.

A definition of express service in terms of perishability, fragility, or value, as recommended by the examiner, could not be articulated with the precision required for tariff publication. To define "express service" with reference to whether or not particular shipments require expedited handling is wholly impracticable. The definition could not be enforced. The traffic to which REA's containers rates apply is moved just as expeditiously as its other traffic, often in the same cars and trucks. No shipper would be likely to admit that the shipments he tenders to REA do not require expedited handling. If REA were obliged to determine whether each shipment tendered required expedited service, it would be required to substitute its judgment for that of its patrons. If REA were required to investigate every shipper's asserted need for expedited service, numerous shipments requiring expedition would be delayed. In apparent recognition of these practical difficulties, the Commission stated at page 340 of its report in the *Nashua* case:

> The choice is the shipper's; if he chooses to have his property move in an expedited fashion he is, in fact, using an express service. It is clearly in the public interest that, if at all possible, this choice not be precluded.

The position of the protesting motor carriers differs from that of the examiner to this extent. Acceptance of the argument of these protestants would not require the Commission to define "express service" in terms of an arbitrary weight limit, or with reference to the transportation characteristics of particular commodities or with reference to such shipments as require expedited handling. Essentially, the position of these protestants is that the term "express", as

used in REA's certificates, is intended to authorize only a service which is noncompetitive with the ordinary freight service provided by general commodity carriers,[6] but competitive with the express service the latter are also authorized to perform, though they seldom choose to do so as such. They further assert that if ordinary freight service improves to the point where it compares favorably with express service, competitive operations by REA would be unlawful. We are unable to reach these conclusions either as a matter of certificate interpretation or in compliance with our obligation to promote the objectives of the national transportation policy.

The intercity highway movements of REA and those of motor freight carriers are performed with the same general type of equipment. REA and its competitors are governed by the same speed limits. Since the latter are authorized and are physically able to perform a service no less expeditious than REA's, the consequence of accepting the protestants' arguments is clear. REA's operating rights would soon resemble an accordion, expanding when the service of its competitors deteriorated or when their rates were increased, and contracting when the service of its competitors improved or their rates were reduced. In other words, the motor carrier protestants contend that, as a matter of managerial discretion, they can determine the effective scope of REA's operating authority. If the Commission had ever intended REA's authority to be voidable at the option of its competitors, the fact would have been plainly stated in at least one of the reports on numerous REA application proceedings. The Commission never so intended.

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[6] There are a limited number of commodities such as articles of unusual value and explosives, which are moved in express service, but which are usually excepted from grants of authority to transport general commodities.

It is true that transportation conditions have changed over the years so as to permit ordinary freight carriers to improve their operations to the point where they are now in a position to provide service substantially equivalent to that of express. Thus the distinction between the two types of services has been blurred to some extent. See *Arrowhead Freight Lines* v. *United States, supra,* at 813. This evolution, however, does not and should not deprive REA of its preexisting rights to conduct express operations in a manner consistent with the enumerated requirements described in the second report in the *Arrowhead* case. Nor do or should these changed conditions prevent respondent from applying new and advanced techniques and methods of handling its traffic or of pricing its service, in order to achieve economies and efficiencies which may directly or indirectly inure to the benefit of the public.

Express service and ordinary freight service, of course, have never been wholly noncompetitive. With changed conditions and the advent of REA's new management in 1959, competition between the two services has been waged more vigorously and on a wider front. Nevertheless, that competition has been peripheral. In 1961, for example, motor freight carriers transported approximately 85 percent of the total less-than-carload and less-than-truckload tonnage moved in the United States. REA's share was only about 2 percent of the total. We are convinced that the division of traffic between express service, as long as its performance and the rates applicable thereto do not contravene any provisions of law, and ordinary freight service ought to be determined by shipper preference, rather than by administrative fiat.

We find that the tariff schedules under investigation are just and reasonable and otherwise lawful.

COMMISSIONER TUCKER, concurring:

While I am able to reach the ultimate conclusion that the proposed rates are just and reasonable and otherwise lawful, I am unable to subscribe to the Commission's rationale in support of this conclusion. And in this case it is the rationale, more than the conclusion, which is important.

As stated in the report, a primary question to be resolved here is "whether an express company may transport at nonpremium rates traffic which is not shown to move more expeditiously than in ordinary less-than-truckload freight service or to require any special handling or protection." To answer this question necessitates an evaluation of what an express company may do; or, in other words, a definition of express service. I think it unfortunate and improper that to approve the proposed rates, the Commission has seized upon a definition of express service which is neither an accurate reflection of Commission and court precedent, nor a prudent regulatory response to the overriding policy issues involved.

Less than 2 years ago, this Commission defended before the courts its decision in the *Nashua* case, *supra*, which was a major reappraisal of certain of the requirements affecting REA's operations by motor vehicle. Included therein were several pages of discussion (91 M.C.C. 322-327) devoted to the meaning of the term "general commodities moving in express service," a term which the Commission points out to be, in effect, synonomous with the lawful scope of express service conducted under part I of the act and, in particular, with the lawful scope of express service which should be controlling here. As I reread those several pages, indeed as I reread the entire *Nashua* case, I find no five criteria listed as "concrete requirements * * * controlling" in defining express service, nor do I find anything which, in its proper context, more than remotely

resembles the Commission's treatment here of the express service issue. What I do perceive in the *Nashua* case is a reliance on a flexible concept of express service which has been recognized by the Congress, this Commission, and the courts; a concept of express identifiable by certain service "attributes," or characteristics, stressing the transportation of small parcels as well as other characteristic undertakings. Thus did we quote in *Nashua:*

> We have consistently recognized certain fundamental differences between express service and ordinary freight service, both by rail and by motor vehicle. Express service contemplates the expedited handling and transportation of comparatively small individual shipments often of considerable value and generally at premium rates. The service may be said to be competitive with ordinary freight service to a very limited extent only, and the mere fact that it can and does survive in competition with general freight service conducted generally at lower rates is indicative of the inherent difference between the two services • • • speed in handling is one of the principal characteristics of express service • • •. [91 M.C.C. at 322]

And this was the type of express service which was recognized by this Commission as being a "relative concept" and one "not susceptible of precise definition." 91 M.C.C. at 324.

On such a basis did we persuade the District Court and the Supreme Court (*Auclair Transp., Inc.* v. *United States, supra*) that our evaluation of express service in terms of its attributes was lawful, for the District Court found that we recognized express service in the *Nashua* case to mean—

> generally the expedited handling of small parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers

> of general freight, and thus requires the payment of premium charges * * *. From this view it follows that express service is not susceptible of precise definition because it is, by its very nature, a service whose attributes of expediency, premium rates and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight. [221 F. Supp. at 332]

The *Nashua* case did not represent this Commission's initial consideration of the express service issue. Like the instant decision, the *Nashua* case looked to the second *Arrowhead* report for guidance. However, to the exclusion of over 77 years of precedent, the instant decision arbitrarily selects and denotes as "controlling" but one paragraph from the *Arrowhead* case, which it then proceeds to use as the controlling basis for interpretations of first impression. The *Nashua* case, on the other hand, reflects not only the entire *Arrowhead* case, but the entire history of express service.

In *Express Cases,* 117 U.S. 1 (1885), the express business was described before the Supreme Court as follows:

> * * * receiving and forwarding upon railroads, steam vessels, and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employees, and at destination personally delivering packages of money or currency, gold and silver bullion, bonds, bank notes, deeds, and other valuable papers, jewels, silks, laces, and other articles of great value requiring for their security extraordinary care and precaution, and also parcels of goods, wares, and merchandise, requiring great dispatch or careful handling, and also fruit, vegetables, fresh meats, fish, oysters, fish spawn, and other articles liable to decay or other injury from delay; and also live

> animals requiring particular care and attention during transportation; * * * and in so doing to afford the public, under a single contract, and on assured responsibility, safe, reliable, and speedy transportation from and to all points accessible only over two or more railroads, and generally to perform for the public all offices that, by usage, are incident to the class of carriers now well known, recognized and designated by the public, as "express carriers." [117 U.S. at 2, 3]

In the same proceeding, Mr. Justice Miller stated as part of his dissenting opinion:

> 1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.
>
> That, while it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized to require the court to take notice of it as distinct from the transportation of the large mass of freight, usually carried on steamboats and railroads.
>
> That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce * * *. [117 U.S. at 30]

And in 1887, the Commission itself described the service performed by express companies as—

> * * * a very general method of transporting all property of special value or of a perishable nature, or

> when speed in transit is for any reason desired. * * * The charges collected for such transportation are relatively high, as compared with the ordinary freight business of railroad companies, but the service is rapid and accurate. The existence of express companies and the facilities which they furnish have developed to immense proportions a busines adapted to the requirements of such traffic. Railroad companies prefer that freight in small parcels and of the nature in other respects considered appropriate to the express business, especially when quick transit is essential, should be handled by those agencies. [*In Re The Express Companies,* 1 I.C.C. 349]

The attributes of speed, special handling, reliability, small parcel emphasis, and "premium" rates, along with the "single responsibility" aspect of express service which had previously been noted by the Supreme Court in *Express Cases, supra,* have marked the rendition of a bona fide express service since the inception of that form of transportation and certainly since the establishment of this Commission. [It was "express service" as thus described which the Commission concluded at 1 I.C.C. 349 was subject to the act when performed by railroads or their agents, and which it recommended in its first Annual Report to the Congress, 1 I.C.C. 254, 273, be specifically included in part I no matter by who performed. Thus in 1906 came the specific inclusion of express companies in the act.]

It is my opinion that we cannot ignore these characteristics, for if the concept of express service has any meaning whatsoever within the contemplation of the Interstate Commerce Act, it must be the meaning which the Congress had before it when it gave statutory recognition to express companies.

What was said in *In Re The Express Companies* by way of describing express service is basically what has been

said by the Commission since, up to and including the *Nashua* case, e.g., *In Re Express Rates, Practices, Accounts, And Revenues*, 24 I.C.C. 380, and 28 I.C.C. 131, in which the Commission concluded that express service should be represented by a simplified form of rate structure; *Railway Exp. Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363; *Railway Exp. Agency, Inc., Extension—Durant-Kosciusko*, 34 M.C.C. 111; *Mistletoe Exp. Service Extension—Texas*, 61 M.C.C. 737, and *Arrowhead, supra*. Nothing the Commission or the courts have said about express service before now has failed to recognize it as a service distinguished from ordinary freight service by the several attributes which permeate its history.

It is, indeed, not a simple task to administer without a rigid definition the provisions of the act with respect to a transportation service the lawfulness of and need for which has been accepted for generations. It is equally difficult to acknowledge that a transportation concept may exist which, to paraphrase Mr. Justice Miller, must be identified by its characteristics or objectives because no precision of words can adequately describe it otherwise. But that, as I see it, is the nature of express service, and as such it is our regulatory responsibility notwithstanding the difficulty of the task.

It is not my purpose to explore each and every facet of the Commission's decision with respect to which I think some question might be raised. Such problems aside, what we are left with is a definition and interpretation of express service which provides no distinctive, substantive transportation dimensions save the exclusions against liquid commodities in tank vehicles, commodities requiring special equipment, and household goods, and no meaningful transportation requirements save a highly questionable single level criterion. In the words of the Commission:

> • • • rejection, suspension or condemnation of rates is appropriate where such rates apply to transporta-

> tion beyond the publishing carrier's authority. In the case of * * * any * * * express carrier *this means* that the publication of rates applicable to delayed service * * * would not be lawful. [Emphasis supplied.]

I see in the Commission's decision no other reasons suggested for the condemnation of an express rate as a means of regulating the proper, reasonable, and legal scope of competitive express service. Moreover, I seriously question whether there is any historical express practice over which we retain effective regulatory control through the definition adopted herein. Whereas express service was conceived and developed largely to transport small-parcel traffic, I can see nothing in the report to indicate that REA's future obligations with respect thereto would be essentially different from those of ordinary common carriers by motor vehicle. Similar questions ought to be anticipated respecting other undertakings historically associated with express service.

I can find no valid justification in the Commission's report for its decision to abandon, for the mechanical recitation adopted, the precedential view of express service in terms of its attributes. The Commission states that "transportation conditions have changed over the years so as to permit ordinary freight carriers to improve their operations to the point where they are now in a position to provide service substantially equivalent to that of express. Thus the distinction between the two types of services has been blurred to some extent." If the "distinction" to which the Commission refers is a legal distinction, then I suggest that it has not "been blurred," but is being blurred by this decision. If the distinction is one of transportation capabilities, then I would point out that the "changed conditions" to which the majority refers existed at the time the *Nashua* case was decided and long before, and that the Commission saw no reason to depart from precedent then. The mere advent of improved highway facilities has not

served to bridge the gap between express and ordinary freight service, if for no reason other than that there are time savings inherent in the express company's single-responsibility service, as opposed to the delays often encountered in interline routings frequently necessary by rail and motor. And in any event, speed in transit has never been the sole criterion for the rendition of express service.

There is no statutory definition of express service or of an express company beyond its classification in part I as a common carrier. To my view, it defies reason to arbitrarily conclude that, for example, a single level of service is a controlling legal "express" criterion, although an express carrier's specialization in the provision of small-parcel transportaiton is not, when everything which has ever been said by this Commission about express service has stemmed from the same initial descriptions of such service as contained in *Express Cases* and *In Re The Express Companies, supra.* In my opinion, express service has been and should be recognized as a composite of all of its characteristics; expedited movement over and above that offered by common carriers generally, special handling, reliability, small parcel emphasis, single responsibility, relatively simple rate structures, and a level of rates higher than those assessed by common carriers generally. When we can view the express company as a whole and, on balance, see that the service being rendered no longer promises to reflect the primary function of the express company within the framework of these historical attributes, then approval of a proposal which threatens further departure by an express company from that function would be inappropriate.

The record in the instant proceeding in my opinion provides a basis upon which to conclude that REA's operations generally present a balanced picture of a bona fide express service. It is predominantly a small-parcel carrier. Its level of rates is generally higher than the level

maintained for ordinary freight service. The majority of its traffic moves in passenger trains, which are faster than ordinary freight service. It seeks to transport, and does transport, commodities such as cut flowers and drugs which receive special handling. That it acts as a single-responsibility carrier on a regularly scheduled basis is not disputed. Accordingly, I am satisfied that its operations overall reflect, through these attributes, the function of express service; and I thus conclude that the proposed rates are lawful in furtherance of the express business.

Although the task of weighing and balancing the attributes of express service can hardly be said to be administratively simple, I think it essential that we continue to exercise some measure of effective regulatory responsibility in this area, especially in the midst of one of the most dynamic eras which transportation has experienced. The concept of express service which the *Nashua* case exemplifies, and which I think is proper, implies a continuing regulatory obligation to evaluate not only express service itself, but the relation between express service and other forms of transportation. Such an evaluation results in nothing being taken from the express company. It requires only that the express company not unduly exceed its intended function. Compare *Umthun Trucking Co. Ext.—Phosphatic Feed Supplements*, 91 M.C.C. 691. Within such a concept, the express company is completely free to expand and utilize innovations and new techniques in transportation—indeed, is encouraged to do so—as long as, on balance, its essential "express" function prevails.

Under the too-mechanical definition of express service adopted by the Commission, the regulatory considerations which should obtain will be obscured.

For example, the Commission's definition may leave us little room to dispose of potential questions arising from the fact that the express company occupies the enviable position of being able to couple its newly defined status with

its established advantage of paying only out-of-pocket rail costs for the movement of the vast majority of its traffic. *Express Contract, 1959*, 308 I.C.C. 545.

If we put all the intervening technicalities aside and simply look at the Commission's first express case and its subsequent regulatory experience in this field, it is clear that express companies were not created under the act as competitors with the nation's ordinary freight transportation plant, but were developed to render service integral to that plant.

It is not possible to predict with accuracy the course which future events will take, and many effects of the Commission's views must remain to be seen. It is reasonable, however, to expect that further development of the express company's services and capabilities will accompany future changes in the economics and technology of transportation.

With this in mind, I am unable to follow the Commission's line of reasoning underlying its approval of the rates at issue. It is an approach which does service to neither the express company nor its competitors. As a guidepost for future competitive relationships, it is too rigid and inflexible to have much practical value in the vital controversies arising between REA and other carriers.

Frankly, I am concerned that the Commission's approach to the issues in this case represents an interruption, and possibly a backward step, in our efforts to develop a truly realistic and comprehensive policy governing the express company's relations with other carriers. The danger implicit in this oversimplified approach is that it may well invite an unrealistic reaction and the application of unwarranted limitations on REA's potential.

Neither the Commission's decision here, nor the reaction it may generate, contributes in any way to what should be our continuing efforts to frame guidelines within which both REA and its competitors may best serve the public

interest. I cannot agree that the Commission's simple solution to the problem is proper, necessary, or desirable as a means to preserve such service.

CHAIRMAN GOFF and COMMISSIONER WALRATH did not participate.

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX A

Pertinent excerpts from the report and recommended order of Hearing Examiner Jair S. Kaplan

Various analyses of the container charges, in relation to the rates of competing carriers, were introduced by the parties. For the movements which took place during the different study periods, REA's container rates were, on an overall basis, lower than the corresponding charges which would have been applicable by either motor carriers or freight forwarders for similar shipments. Based on information supplied by the shippers of the 91 sample containers, 82 would have moved by motor and 9 by freight forwarders had the proposed rates not been in effect. Excluding four containers as to which no specific competitive rate data was available, the total charges by the indicated two modes previously used by the shippers for transporting the traffic would have amounted to $7,116.07, as compared with the corresponding REA container charges of $5,657, resulting in a reduction of about 20 percent.[1] Omitting

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[1] In 11 of the 87 instances given, REA's charges were higher than those which would have been applicable by the prior modes.

from the 91 sample shipments 47 which protestant freight forwarders considered as not being of a nature reasonably expected to move in their service, principally because of the relative short hauls involved, the forwarder total charges on the remaining 44 shipments would have been approximately $4,958, as compared with $3,610 by REA, which is about 27 percent lower. With respect to 36 of the 47 omitted shipments,[2] REA shows that its container charges totaled $1,838, or about 25 and 37 percent, respectively, lower than the comparative charges of $2,463.81 for motor carrier and of $2,936.48 for forwarder service.[3] The percentage reductions on most of the shipments handled by REA during the 7-week period previously mentioned, ranged, according to protestant motor carriers, from approximately 7 to 43 percent, the greatest majority being 20 percent or more, under the truck rates. For example, on 31 container shipments, with an average weight of 2,494 pounds, moving within Middle Atlantic territory, respondent's charges were by about 24 percent lower than those of motor carriers.

Eleven typical container movements were depicted by a shipper of electric motors, rated class 70 and 77½ for truck transportation. They took place during the first 5 months of 1962, from Buffalo to Detroit, Mich., Atlanta, Ga., Boston, Mass., and Dallas, Tex., and aggregated 29,227 pounds, or an average of 2,657 pounds per container. The total REA charges were $635, as compared with $922.45, had the shipments moved by motor, involving a reduction of 31.2 percent. The differences ranged from $14.90, for a container of 11 pieces, weighing 1,948 pounds, to Atlanta, where the Respondent's charge was $63, as against $74.90 by motor, to $48.65, for a container of 26

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[2] Assuming that forwarder service was not available as to only 11 of the 47 omitted shipments.

[3] The motor carrier rates appear to be at an average level of 83.8 percent of the freight forwarder rates.

pieces, weighing 2,982 pounds, to Dallas, where REA's charge was $93, as against $141.65 by motor. Another shipper has used the container service for the transportation of drugs and medicines from its manufacturing plant also at Detroit. The traffic has a motor carrier classification of column 70, when released to a value not exceeding 50 cents per pound, and a density range of from 20 to 40 pounds per cubic foot. The company has shipped containers only to its own branches in 13 cities. During a 5-month period, from February 16 to July 15, 1962, it shipped traffic amounting to 139,732 pounds in 70 containers, averaging 2,329 pounds per container. It paid to REA $3,280 for this service and, had it shipped by truck, the charges would have been $4,009.58. The container charges were 18.2 percent below the motor charges. Somewhat similar examples were given by other shippers.

All of the shippers generally agree with respondent that the quality of REA's service, especially insofar as it relates to pickup and delivery and time in transit, is not substantially different from that of motor carriers. Admittedly, despite certain advantages inherent in container service, the principal incentive for the use of respondent is its lower charges as compared with competing modes, particularly truck transportation. The differences in total charges depend to a large extent on the actual weight loaded in a container. There is a weight break, indicated by certain shippers to be about 1,700 or 1,800 pounds, below which point it is cheaper to ship by motor and above which it would be cheaper to ship in REA's container service. In most instances the traffic they have offered to respondent has been of the so-called captive variety. Further shipper evidence concerning the tonnage actually or potentially subject to diversion is hereinafter described.

A steel casting company ships from Portland, Oreg., certain parts of rock crushing machiner, power shovels, and similar equipment, with an average uniform classifica-

tion rating of class 60. While its transcontinental traffic generally moves in carloads and in piggyback service, about 50 percent of its movements within 11 Western States, amounting to about one million pounds per month, is suitable for respondent's container operations. The limited use of the latter service thus far has been due to the uncertainty of the outcome of the instant proceedings. The previously mentioned shipper of drugs and medicines from Detroit, based upon its actual experience with REA's service during 5 months in the first half of 1962, estimated that its annual container shipments would amount to somewhat over 335,000 pounds, involving a loss of $9,623 in revenue to competing modes. The container traffic formerly moved about 90 percent by motor carriers, 5 percent by freight forwarders, and only 5 percent by REA. Another manufacturer and distributor of drugs and medicines has used the container service from Brooklyn, N. Y., to Denver, Colo., Minneapolis, Minn., Los Angeles and San Francisco, Calif., Cincinnati, Ohio, Houston, Tex., and Boston or Cambridge, Mass. Based upon its past experience, it estimated that its annual potential container volume would be about 1,000,000 pounds to Denver, 380,000 to 400,000 pounds to Minneapolis, 415,000 pounds to Chicago, and 200,000 pounds to Cambridge. The traffic now moving by container has been diverted from motor carriers and freight forwarders. A third shipper of drugs and medicines expects to offer REA two or three containers a week, with ladings averaging 2,130 pounds, from Hammonton, N. J., to Pittsburgh, Pa. About 50 percent of the traffic which formerly moved by motor carriage is now being transported by REA. The previously mentioned manufacturer of electric motors at Buffalo has so far actually shipped container traffic to only a limited number of destination points, at a rate of about two or three containers a week. While it estimates its annual container traffic to be about 600,000 pounds to 10 principal points, it has a potential use to all of the 35 cities named in the tariff. The traffic moving

in container service has been diverted mainly from motor carriers and freight forwarders. A manufacturer of sharpening stones at Littleton, N. H., has utilized REA's container service to eight principal points. This traffic thus far has amounted to approximately 40,000 pounds per month and has been diverted primarily from motor carriers. The freight has an average density of 37.2 pounds per cubic foot and is rated class 55 for motor transportation. A check of container traffic by the transportation manager of the Chamber of Commerce of Louisville, Ky., revealed 22 inbound and 21 outbound shipments from and to about 10 principal named points. Although the traffic was rated from first to third class, REA's container charge represented the equivalent of 50 percent of first class. Some of this Louisville freight was diverted not only from motor carriers and freight forwarders, but also from rail less-than-carload service and private carriage.

Freight forwarder operations performed in the movement of less-than-carload shipments are substantially similar to those of REA, not only with respect to pickup and delivery, but also insofar as the use of underlying railroads is concerned. However, the traffic of the former moves on freight rather than passenger trains and the charges to the forwarders for the rail line-haul transportation are ordinarily based on the published carload rates, rather than on any special arrangement on an out-of-pocket cost basis such as the one obtaining between REA and its railroad owners. Freight forwarders compete with each other and with motor carriers particularly for the transportation of less-than-carload or less-than-truckload ordinary freight, as contrasted with the relatively smaller express shipments. One of the three forwarder protestants which submitted evidence showed that the average weight of its shipments was 415 pounds in 1960 and 430 pounds in 1961. Another of these three freight forwarders handled in 1961 nationwide 3,039,636 shipments weighing 599,640 tons, or an average of about 400 pounds per shipment. The latter paid

$51,727,889 for purchased transportation and incurred other operating expenses amounting to $21,013,052, as compared with transportation revenues of $72,622,196, resulting in a deficit in net income of about $98,864. The three freight forwarders generally indicate that due to the establishment of the relatively low container rates they have lost traffic. Concededly, some of this loss has been limited or its volume is not subject to precise determination. Nevertheless, they were able to give certain specific examples. For instance, two of the forwarders handled drugs and medicines for the Brooklyn shipper. The traffic of one of the forwarders amounted to 416,859 pounds in 1961, as compared with 135,600 pounds during the first half of 1962, to seven of the destination cities. The second forwarder handled an average of 30,000 to 40,000 pounds monthly from that shipper prior to the establishment of the container rates, but only 8,000 pounds per month thereafter. The third forwarder had lost in the first 7 months of 1962 about 75,000 pounds of freight moving from a point in New York, because REA's rates were 15 to 17 percent lower than its own corresponding competitive rates. No specific traffic data has been presented by any protestant motor carrier.

The four rail protestants, Southern Pacific Company, Missouri Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and Union Pacific Railroad Company, compare REA's container charges with representative rail carload and less-than-carload rates, as well as freight forwarder less-than-carload rates from New York City, Chicago, Ill., and St. Louis, Mo., to either Los Angeles, Calif., or Houston, Tex., on numerous commodities. REA's charges were converted for this purpose to rates per 100 pounds, based on a container lading of 2,500 pounds. In practically all instances, the REA's rates are lower than the rail less-than-carload rates and the corresponding freight forwarder rates, the latter generally being on a slightly lower level than the rail less-than-car-

load rates. There are a substantial number of carload rates which are higher than the converted REA rates. For example, of the rates on 129 articles listed by the Santa Fe from Chicago to Houston the rail carload rates produce the lowest rates in 89 instances, while REA charges are the lowest in the remaining 40 instances. A specific example is the REA's converted rate of $2.56, as compared with the rail carload rate of $2.73, minimum 24,000 pounds,[4] and the rail and freight forwarder less-than-carload rates of $3.84 and $3.82, respectively, on advertising matter and on printed matter, paper or paper board, n.o.i.b.n. Included in the 7-week survey, there have actually been container shipments to points in western territory of such commodities as advertising and printed matter, automobile parts, bearings, drugs, electrical appliances, flavoring compounds, and photographic materials. However, none of REA's container movements from one consignor to one consignee involved total quantities approaching a carload. Moreover, insofar as the 1,019 carload rates listed by rail protestants are concerned respondent shows that only 78, or about 8 percent, of these rates are based on exception ratings or commodity rates equivalent to class 35 or higher. Generally, an insignificant amount of carload traffic moves on class rates, producing only 3 or 4 percent of rail revenue. Respondent asserts that since no data has been submitted as to any actual transportation under the rail carload rates —or, for that matter, also under rail less-than-carload rates—such "paper" comparisons should not be given any weight.

In 1961, the Southern Pacific and the Santa Fe System, respectively, derived revenues of about $5.9 and $7.8 million, for the transportation of 165,894 and 194,956 tons of less-than-carload traffic; $11.9 and $35.3 million for 45,894 and 100,511 cars, or 584,128 and 973,287 tons of freight forwarder traffic; and $4.6 and $6.7 million for handling REA's less-than-carload express traffic. The corresponding rev-

[4] Subject to Rule 34 of the uniform freight classification.

enue figures for the Union Pacific, and the Missouri Pacific, respectively, are $6.8 and $2.8 million, for less-than-carload traffic; $17.3 and $4.4 million, for freight forwarder traffic; and $4.6 and $3.3 million for express traffic. The latter railroad handled during that year 209,207 tons of less-than-carload traffic, with an average revenue of $13.45 per ton; 260,820 tons of freight forwarder traffic, with an average revenue of $178.11 per car and $16.94 per ton. The average revenue of the Missouri Pacific on all carload traffic, but excluding that of forwarders, was $159.13 per car and $3.89 per ton. The protesting railroads also show representative schedules and elapsed time for trains transporting express traffic, as compared with freight trains handling less-than-carload merchandise and freight forwarder carload traffic. The former, being passenger trains operating at speeds somewhat greater than ordinary freight trains (including time spent in terminals), would provide in most instances from 1 to 2 days faster service from New York, Chicago, or St. Louis, for example, to certain points in Missouri, Texas, and California. The difference in time is particularly pronounced in connection with the long-haul transcontinental service.

APPENDIX B

Pertinent excerpts on costs from the recommended report and order of Hearing Examiner Jair S. Kaplan

The out-of-pocket costs, per car-foot mile, for rail line-haul movement of REA's less-than-carload traffic are shown to be 7.222 mills, as computed by respondent, and 9.345 mills, as computed by the protestants. As previously indicated, and without judging the propriety of either figure, but merely to be on the conservative side, the protestants' higher cost will be accepted for use here. Based upon the area of 21.39 square feet occupied by a container and 8 square feet per one car foot, a container foot would be equivalent to 2.674 car feet. Multiplying the latter figure

by the protestants' cost per car-foot results in 2.5 cents. The ratio of 16.7 percent for empty container miles increases the line-haul cost to 2.9 cents per container mile.

The protestants object to the fact that in computing the line-haul cost REA failed to make an allowance for the operation of more assigned car-foot mileage than was actually utilized. The protestants computed container-mile cost on the basis of 19 percent utilization of space. While in 1960 there might have been 12.2 cubic feet of less-than-carload lading for each assigned car foot, REA's revised study for the fiscal year ending June 30, 1962, showed 23.1 cubic feet for each assigned car foot. REA maintains that the average load factor for all traffic is not applicable to the containers because the latter has exceptionally good loading characteristics, as compared with many articles, generally transported by it. Respondent handles in large quantities or frequently such commodities as fish, flowers, live animals, milk and cream, and explosives which have relatively low space utilization. These commodities require sufficient room to assure good ventilation or segregation from other freight to avoid damage or contamination. Among other items which depress the average load factor are gift fruit and tomato plants, which move seasonally and with a tendency toward a one-direction haul, as well as securities, currency, art works, and other valuables, which are accompanied by a messenger. Taking into consideration all of these circumstances, in addition to the fact that the containers are also top loaded, it is reasonable to conclude that the load factor and space utilization of the containers are more favorable than for the average traffic handled by respondent.

Terminal costs consist of sorting, platform handling, pick-up and delivery, and transfer functions within terminal areas, plus the overhead cost related thereto. REA's physical plant and its methods of operations have been developed to handle a large volume of relatively small packages. The movement of the containers will, admittedly,

entail some changes in the facilities and procedures of respondent. Because of its newness and experimental character, REA was convinced that it would be impracticable to attempt to ascertain the exact terminal costs for handling container traffic, until a sufficient volume thereof is secured and its facilities and operating practices are modified to handle the containers efficiently. As the best estimate of terminal costs, an illustrative container movement from Detroit to New Orleans, La., was chosen and a comparison was made between the known costs of handling separate packages and the cost of handling a similar shipment in a container. The comparison was based on a detailed count of the man-minutes and vehicle-minutes at each step or stage of the shipment handling. The technique of methods-time-measurement was used to determine the man-minutes consumed in loading or unloading a vehicle. Other items, such as vehicle travel time, waybill preparation, and platform transportation time were based on the system time values derived from studies made at 39 cities.

The protestants criticize the use of these system time values which are termed performance standards. The word "standard" is perhaps misleading here because it is widely used in management control of costs and in industrial cost accounting to mean an optimum degree of efficiency attainable only under ideal conditions, and against which actual performance is measured. Apparently, that is not the meaning intended here. The performance standards presented by REA are actual work measurements at 39 cities. The studies were extensive and included the detailed examination of more than 442 vehicle routes, 9,086 vehicle stops, and the handling of 20,259 pieces; all of which involved more than 7,832 observer man-hours and more than 32,987 individual stopwatch readings. Being actual work measurements, and not ideals or optimums, they are suitable for use in estimating the cost of the functions studied.

The protestants took exception also to the manner the vehicle travel time was allocated, which varied from the method usually employed by the Commission's cost finding section. However, the record does not contain the data required for the application of the latter method. Considering the fact that the minutes per shipment figure is very low and that it represents the allocation of all vehicle running time, it is doubtful that the method contended for would produce a greatly different result. Respondent's method is acceptable for the purposes of this proceeding.

Based on a study of system data for the period from February 1959 to August 1962, REA determined that the variability of man-hours with shipments was 75 percent. It asserts that since its direct cost comprises 75 percent of its total cost, this percentage figure represents a good approximation of its out-of-pocket costs. In support of this relatively low variability, respondent points out that fixed man-hours are caused by salary and small terminal offices, definite and inflexible vehicle assignments, large clerical staffs, and by the special services required in providing express service. The protestants, on the other hand, use a variability percentage of either 90, based on studies of motor carriers, or of approximately 100, based on a study relating man-hours to shipment handlings for the four REA regional groups for the months of July and December.

REA draws attention to the fact that its operations are not comparable with those of motor carriers, the latter performing line-haul as well as terminal operations, whereas those of respondent are mostly terminal in character. REA criticizes the July and December study on the grounds that it selected and used only a part of the data available; it treated the four REA regional groups as different but homogeneous units, without considering the revelant facts peculiar to each; and it left unexplained that portion of the regression line purporting to show that if REA's volume decreased to a minimum level, respondent would incur no costs whatsoever, despite the fact that it would

continue to exist and operate. Without resolving the question of the relationship of REA's direct costs to out-of-pocket costs, and again in order to be most conservative, the usual 90 percent variable for motor carriers advocated by protestants will be used to test the compensativeness of the rates. According, the $9.08 per container shipment for all direct costs, other than line-haul, presented by REA and referred to as terminal costs, should be raised to $10.90.

Computing the out-of-pocket costs on the basis of the indicated line-haul expenses per car-foot mile and REA's terminal expenses raised to the 90 percent variable level, for (a) the average shipment drawn from the study of the 740 container movements previously described, for an average haul of 1,071 miles, and (b) the illustrative shipment from Detroit to New Orleans, La., involving a distance of 1,204 miles, shows the following results:

	Average shipment			Illustrative shipment		
Revenues		$70.86			$68.00	
Out-of-pocket costs:						
Line-haul	$31.06			$34.92		
Terminal	10.90		*Percent*	10.90		*Percent*
Total		41.96	100		45.82	100
Excess		28.90	68		22.18	48.4

These costs are necessarily based on certain assumptions as to operating conditions and practices, such as loading characteristics of the rail cars used and the delivery of an empty container on the same trip when the loaded container is picked up. However, the margin of revenue over cost appears substantial enough to cover any difference between the conditions anticipated by the costs and those which actually exist or which may develop when the traffic is moving regularly and in volume. If anything, it is reasonable to expect that under the latter circumstances, the unit costs of REA would improve. The examiner concludes that the proposed rates have been shown to be compensatory.

APPENDIX C

Statutes Involved

National Transportation Policy

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Combinations and Consolidations of Carriers

Sec. 5 [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.*] [*49 U.S.C. § 5.*]

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any

contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

* * * *

(2)(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission

shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Application for Certificate of Public Convenience and Necessity

Sec. 206 [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950, July 12, 1960, October 15, 1962.*] [*49 U.S.C. § 306.*]

(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by

motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instances as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operations to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this chapter, or hereafter issued under this chapter pursuant to an application filed on or before September 1,

1950, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

* * * *

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of subsection (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle on October 1, 1935 may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

Issuance of Certificate

Sec. 207 [*August 9, 1935,*] [*49 U.S.C. § 307.*]

(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission there-

under, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways.

Terms and Conditions of Certificate

Sec. 208 [*August 9, 1935.*] [*49 U.S.C. § 308.*]

(a) Any certificate issued under section 306 or 307 of this title shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 304(a)(1) and (6) of this title: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., et al., and ACME FAST FREIGHT, INC., et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

RAILWAY EXPRESS AGENCY, INC.,
Appellee, by its attorney,
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, Railway Express Agency, Inc. (sometimes hereinafter called R E A), appellee, moves that the judgment of the District Court be affirmed.[1]

Statement

This is a direct appeal from a final judgment entered on May 31, 1966 by a three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2325 dismiss-

[1] The opinion of the District Court is reported at 254 F. Supp. 633.

ing appellants' complaint which had sought to set aside an order of the Interstate Commerce Commission. This order approved interstate common carrier transportation rates published by R E A and R E A was a party to the proceeding before the Commission. Accordingly, R E A was permitted to intervene as a party defendant before the District Court pursuant to the provisions of 28 U.S.C. 2323.

The record below contains a succinct and unrebutted summary of R E A's business supplied by R E A's President:

> "R E A is an express company which holds itself out at all points in the United States to pick up, transport, distribute and deliver small shipments. It is the only transportation agency in the country which combines the following services:
>
> 1. It makes pickup and delivery service available to more than 80% of the population of the United States.
>
> 2. It provides every shipper and every receiver with a small shipment transportation service which is as expedited, safe and certain as the service the shipper can obtain from motor carriers only on truckload quantities.
>
> 3. It carries packages regardless of their size, shape, density, weight, market value, and unusual transportation characteristics.
>
> 4. It discharges its duty to serve the public on all routes without regard to density of traffic or available volume at terminal areas involved.

Consequently, R E A is a very important element in the national transportation market." (Exhibit 1, pp. 1-2)

In 1962 R E A published a new tariff applying between 35 of the several thousand cities served by R E A which decreased the applicable express rate when the shipper was willing to put his shipment in a container furnished by R E A. These container loads each carried an average of 86 packages (Examiner's Report, p. 8). If these 86 packages were not containerized each would have to be handled separately at more than 8 points in the transportation process (Exhibit 42, pp. 6-7; J.S. p. 11a). Thus containerization reduces package handling costs and the idea of the tariff was to pass these cost savings on to those shippers whose willingness to use containers made the savings possible.

As the court below found (J.S. p. 4a), R E A will carry any commodity, whether perishable or not, between any of the cities it serves. Furthermore R E A will carry any containerload between any two points. However, R E A will not furnish the shipper with a container except between the 35 cities named in the container tariff, and then only when the shipper loads into the container what the tariff calls for. R E A gives such containerized traffic just as expeditious service as it gives all other express shipments (J.S. p. 22a).

The report and order of the Interstate Commerce Commission[2] which is the subject of this appeal concerned this tariff schedule of charges for the express

[2] *Freight, all kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468 (Docket No. 33977, October 19, 1964).

transportation of cargo in containers between some thirty-five cities in the United States stretching from New York and Washington on the East Coast to Seattle and Los Angeles on the West Coast, and from Minneapolis, Chicago, and Boston in the North to Dallas, New Orleans, and Jacksonville in the South. The charges include supplying the shipper with an R E A-owned wire mesh container of 101 cubic foot capacity, its transportation when loaded to the receiver's address, and its removal from the receiver's premises when unloaded. The charges, established on a point-to-point basis and varying with the length of haul, remain the same regardless of how little or how much the shipper loads in the container up to a maximum of 2,500 pounds; above that limit the shipper pays a per cwt. surcharge up to the maximum engineered container weight limit of 3,000 pounds. The charges apply to any commodity loaded in the container except for a few categories of shipments operationally inappropriate for containerized transportation, for example, human remains, money, live animals, and shipments requiring refrigeration or protection from heat (J.S. pp. 8a, 22a). The Commission found that "these commodities do not appear to lend themselves readily to movements by the described containers" (J.S. p. 22a). No exception was taken to this finding below nor do appellants appear to contest it in this court.

Some of the appellants as competitors of R E A objected to these container rates on the ground that they were too low and filed these objections with the Commission in the form of protests. The Commission, pursuant to Section 15 of the Interstate Commerce Act, 49 U.S.C. sec. 15, began an investigation of the

lawfulness of these rates and, after taking evidence, reviewing an examiner's recommended report, and hearing argument *en banc*, entered an order finding the container rates lawful, declining to cancel them, and discontinuing the investigation. The court below unanimously affirmed the Commission's decision.

The historical economic reason for publishing the container rates under review was described by the Commission as follows:

> "As a result of the increased competition from motor carriers for short-haul traffic and from freight forwarders for long-haul traffic, and the comparatively high rates of respondent for what has come to be generally equivalent service, R E A lost substantial less-than-carload traffic, particularly in the 2,000 to 3,000 pound weight bracket. Its general financial condition steadily deteriorated." (J.S. p. 13a).

The evidence below shows that R E A's container volume amounts to less than 200 containers a week or 10,400 containers a year (J.S. p. 14a). R E A handles about 60 million shipments a year (J.S. p. 12a). The appellant motor carriers have 85% of the available volume in the small shipment market and R E A has 2% of it (J.S. p. 27a). Appellants at page 12 of their jurisdictional statement say that the effect of the decision below "is to authorize a new operation in the transportation of general freight over virtually the entire nation. The effect upon the motor industry as a whole cannot even be gauged." Whatever may be the legal relevanec of this factual speculation, the record below does not bear it out; if appellants have

85% of the market, if REA has 2%, if REA's annual volume is 60 million shipments, and if the suggested rates generate only 10,000 shipments, the better assessment of the record is to say, "the effect upon the motor carrier industry as a whole cannot even be felt."

Argument

(1) This appeal presents no substantial question warranting plenary review by this court. All the questions involved stem from two aspects of I.C.C. regulation of the two forms of surface linehaul used for express traffic. REA uses highway trucks and rail passenger trains for linehaul. About 5% of the linehaul volume moves by truck (J.S. p. 14a). To move this REA needs, and has received from the Commission highway certificates of public convenience and necessity under Part II of the Interstate Commerce Act, 49 U.S.C. sec 301 *et seq.*, authorizing carriage of "general commodities in express service." (J.S. p. 16a). To move the 95% remainder by rail train under its existing contractual arrangements with the railroads, they and REA need a pooling license from the I.C.C. under section 5(1) of the Interstate Commerce Act, 49 U.S.C. sec. 5(1). This license, issued in *Express Contract, 1959*, 308 I.C.C. 545, is likewise limited to the provision of "express service." (J.S. p. 18a).

Appellants say that the phrase, express service, implies three limitations: (1) it refers to a particular type and size of shipment, (2) it requires the express carrier's price to be higher than appellants' price for the same traffic movement, and (3) it prohibits REA

from providing any service which any of the appellants provide.

As to the first contention the Commission noted that, since 1906 when express transportation became subject to I.C.C. supervision, R E A and its predecessors have traditionally handled shipments ranging in size from 20 pounds to complete rail carloads (J.S. p. 11a). Appellants apparently ask that "general commodities in express service" be construed to mean "general commodities moving in the form of shipments which: (a) weigh less than 500 pounds, or (b) require expedited service, extra service or special handling because of their perishability, fragility or value." (J.S. pp. 5, 16a). The Commission declined thus to construe these words, and said that the limiting element of this phrase is not the words "general commodities" but rather the words "express service." The distinguishing feature of an express transportation company is not the type of shipment it handles, but the type of service provided when handling it.

> "Even if it seemed desirable to do so, there is no basis in this record for defining express service generally in terms of shipment size or weight." (J.S. p. 24a).

> "A definition of express service in terms of perishability, fragility, or value * * * could not be articulated with the precision required for tariff publication." (J.S. p. 25a).

Instead the Commission said that R E A's licenses limit R E A to "perform a particular type of *service*" (J.S. p. 16a). The Commission then pointed to a 1955 decision—the end product of a four-year course

of litigation—setting the five standards which the service of an express company must meet in order to comply with the limiting terms of a highway express certificate of public convenience and necessity, namely *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573. The Commission listed these (J.S. p. 21a), found that R E A's service met these standards, and therefore concluded that R E A's container rates did not cover a service which failed to conform to the operations authorized by R E A's highway certificates.

Appellants' second contention was that express service requires maintenance of premium prices. The Commission rejected that position as contrary to this Court's rulings concerning destructive transportation competition in *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 759 (1963) (J.S. p. 15a). The Commission's examiner described as "inconceivable" the establishment of "an almost automatic requirement that would allow the minimum level of express rates to be set by carriers of ordinary freight and thus, in effect, transfer to the latter a managerial discretion rightfully belonging to the express company." (Examiner's report, p. 33).

The third limitation which appellants wanted the Commission to read into "express service" was a prohibition against any sort of competition with general freight carriers. This amounted, the Commission found, to rendering "R E A's authority voidable at the option of its competitors" and such an interpretation would conflict with promotion "of the objectives of the national transportation policy." (J.S. p. 26a).

Thus this three-pronged argument concerns the interpretation of licenses issued by an administrative agency. The question is not the legal limitation of the agency licensing power, but only the meaning and purpose which the Commission had when it issued R E A its rail pooling and its highway motor carrier licenses. The Commission is in the best position to discern, articulate and explain its own meaning and purpose, and the report below supplies good and adequate reason for the interpretation arrived at. Therefore the questions presented are not substantial enough for this court's review.

(2) Appellants complain, however, that the Commission has interpreted these R E A licenses differently in the past and is estopped to alter its prior rulings. The contention is wrong both in its factual premise and its legal conclusion. The decisions to which appellants point[3] are none of them interpretations of licenses issued to R E A. Instead they are the agency opinions pursuant to which these licenses were granted in the first instance. In these, as in all contested Commission highway licensing proceedings, a fundamental issue was the competitive impact of the new market entry sought by the applicant on the existing market entrants who were objecting to the application. To assess this impact the Commission had to form a factual opinion about—not the legal—but the *practical*

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[3] *Railway Express Agency, Inc. Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962) (J.S. p. 9); *Railway Express Agency, Inc. Extension—Durant-Kosciusko*, 34 M.C.C. 111 (1942); *Railway Express Agency, Inc. Extension—Madison, Wis.*, 94 M.C.C. 677; *Railway Express Inc. Extension—West Unity-Middletown*, 31 M.C.C. 363; *Railway Express Agency, Inc. Extension—Charlottesville*, 94 M.C.C. 62; *Railway Express Agency, Inc. Extension—Great Falls, S.C.*, 94 M.C.C. 102 (J.S. p. 11).

scope of competitive operations which the applicant could be expected to institute once the market was opened to him.

R E A, being a well-established carrier whose history of operations extends back over many decades prior to the Motor Carrier Act of 1935, the Commission formed its factual conclusion concerning the likely future scope of R E A competition with motor carriers on the basis of what R E A had been doing in the past. In these decisions the Commission noted that R E A's shipments tended to be much smaller than those of the protestant motor carriers, R E A's prices tended to be higher, and R E A's traffic tended to be more exotic in terms of perishability, fragility and value. Therefore, the Commission rejected the practical and factual contention of the protestant motor carriers that R E A's highway market entry would harm them.

In these decisions the Commission was addressing itself not to what R E A could *lawfully* do but instead to what it was *likely* to do as an express motor common carrier. These descriptions of R E A's actual operations did not constitute a "definition" of express service, i.e. an interpretation of the legal boundaries of the franchises being granted R E A. In point of fact, according to the record below R E A's average operations still are as the Commission's licensing opinions predicted they would be (J.S. pp. 11a-12a). R E A's average shipment weight is still only 50 pounds, more than nine tenths of R E A's shipments weigh less than 100 pounds, and less than 9% of R E A's shipments move under lower express transportation rates than the comparable general commo-

dity motor carrier rates which apply to shipments weighing 100 pounds or more.

However, even if the Commission had changed its definition of express service below, that too lies within the lawful scope of agency power and raises no question substantial enough for this court's review. The Commission and other agencies have often changed their minds and been upheld when they did so. This is particularly true when the question at issue is the interpretation of a carrier license. *Ace Lines, Inc.* v. *The United States,* 197 F. Supp. 591, 598-599 (S.D. Iowa 1960).

As the Federal District Court in Louisiana has noted in *Coyle Lines, Inc.* v. *United States,* 115 F. Supp. 272, 279 (E.D., La. 1953), "It may be that the findings of the Commission in the case at bar appear inconsistent with its findings in the *Commercial Barge Lines* case. However, as said by Mr. Justice Brandeis in *Virginian Railroad Company* v. *United States,* 272 U.S. 658, 666, 'This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions *or with the alleged inconsistency with findings made in other proceedings before it.*'" (Emphasis supplied). In accord are *Northern Pacific Railway Company* v. *United States,* 41 F. Supp. 439, 446 (D. Minn. 1941) aff'd. 316 U.S. 346 (1941); *Virginia Stage Line* v. *United States,* 48 F. Supp. 79 (W.D. Virginia 1942); *N.L.R.B.* v. *Baltimore Transport Co.,* 140 F.2d 51, cert. den. 321 U.S. 795 (4 Cir., 1945); *WOKO Inc.* v. *Federal Communications Commission,* 153 F.2d 623, 631 (App. D.C., 1946), rev'd 392 U.S. 223, 227-8; *Churchill Tabernacle* v. *Federal*

Communications Commission, 160 F.2d 244, 246 (App. D.C., 1947); *State Airlines, Inc.* v. *Civil Aeronautics Board,* 174 F.2d 510, 518 (App. D.C. 1949), rev'd. on other grounds, 338 U.S. 572 (1950); *Western-Inland Mail Rates,* 14 C.A.B. 201, 250-251, 253-254 (Docket 2870, Order E-5467, June 26, 1951), modified for other reasons *sub nom. Summerfield* v. *Civil Aeronautics Board,* 207 F.2d 200 (App., D.C., 1953); *Motor Freight Express* v. *United States,* 119 F. Supp. 298, 305 (M.D., Pa., 1954); *ABC Freight Forwarding* v. *United States,* 169 F. Supp. 403, 405 (S.D., N.Y. 1959).

Judge Magruder has supplied with clarity the explanation of any precedents which appear to conflict:

> "Petitioners * * * claim that prior Commission decisions * * * must be adhered to by the Commission or specifically announced as abandoned. * * * The courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. * * * *Where,* as in the instant case, *the findings are on their face adequate and explain the basis for decision,* there is no occasion to examine consistency with prior decisions." *M & M Transportation Co.* v. *United States,* 128 F. Supp. 296, 300-301 (D., Mass., 1955). (Emphasis supplied).

In short, the alleged conflict between the "definition" of express service in the proceeding below and in prior Commission cases raises no question substantial enough for this court's review both because the conflict does not exist and because, if it did exist,

the Commission in the discharge of its regulatory functions is under no duty to avoid such conflict *per se*.

(3) Appellants imply that the Commission decision below amounts to the issuance to railroads of a national license to go into the trucking industry. A less appropriate case could hardly be imagined for resolution of such a question. It can pertain only to the highway linehaul of express traffic. Only 5% of *total* express traffic moves by highway. Only 10,000, or 0.02% of R E A's 60,000,000 annual shipments a year move in containers. Thus the case raises a question concerning only one twentieth of less than two hundredths of one per cent of R E A's traffic. Inasmuch as the national ratio of express to general motor carrier tonnage is 2:85 (J.S. p. 27a), the alleged railroad salient in the motor carrier market is so minute as to defy measurement.

In any event the question is not substantial because the Commission requires *all express traffic,* whether rail or highway, to be given service which meets the five benchmarks set out in the *Arrowhead* case, supra, and counsel for the motor carriers conceded below in argument before the Commission sitting *en banc* that general commodity carriers do not compete at these service levels:

> "Mr. Rea: I wouldn't concede that the motor carriers refused to handle small shipments. They do handle them—too many they say. But they don't give them the service because they are not geared to giving them the service that R E A

> traditionally can, traditionally has and can give them. * * * R E A can very quickly and easily establish that it is rendering a service * * * respecting small shipments which the motor carriers do not render,—whether they can or could is beside the point—they do not render it." (Tr. p. 1877)[4].

No question can arise of express invasion of the motor carrier market when less than one ten-thousandth of that market is at stake, and when the Commission compels R E A to maintain service standards well above those which the motor carriers are willing to meet.

(4) Appellants' final contention is that, assuming the correctness of the Commission's definition of express service, R E A's container tariff No. 52 causes R E A's service to fall below the Commission's *Arrowhead* bench marks. The Court below dealt with this so ably and succinctly that its words bear repeating:

> "Plaintiffs contend that even under the five criteria, the container tariff is inconsistent with R E A's authority as an express carrier. This calls for a brief analysis. Criteria (1) and (2), fn. 3, *supra,* are closely related. (1) is that an express agency must 'transport any commodity which may be safely transported in ordinary van-type equipment.' Although, as previously mentioned, R E A excepts certain items from its container service tariff, it holds itself out to transport the excepted items under its other tariffs.

[4] Because of its illuminating candor further excerpts from this argument are set out in Appendix A.

(2) is that it must provide such care and security as the commodity may require. Contrary to plaintiffs' intimations that commodities not demanding special treatment are within the exclusive domain of freight carriers, R E A would certainly fail in its obligations if it refused to carry goods because they were not valuable or did not require special care.

"Criterion (3) is that all shipments be handled with equal expedition from point of pickup to point of delivery. Plaintiffs do not contend that, once the container is in R E A's hands, it is transported less expeditiously than other express shipments. Plaintiffs do argue, however, that R E A fails to meet this criterion because the shipper has 48 hours free use of the container before and after shipment. We cannot agree. Obviously, it takes little time to load the container. The shipper's independent decision when to initiate the shipment cannot be imputed to the carrier if, as is the case, the carrier is willing and able to pick up, transport, and deliver the lading expeditiously on being called upon to do so. Any shipper of a single article, or of many articles in his own container, has an equal option.

"As for criterion (4), plaintiffs do not contend that R E A's transportation of the containers does not follow firmly fixed schedules, with fixed delivery times. And, although the meaning of criterion (5)'s 'relatively simple billing (and) rate structures' is not entirely clear, there is no suggestion that R E A's rate structure is not simple, even with this added tariff." (J.S. pp. 4a-5a).

In their jurisdictional statement appellants especially object to the commodity exclusions in the container tariff, e.g. human remains. They do not contest the Commission's findings that the excluded commodities do not "lend themselves readily to movement in the described containers" (J.S. p. 22a). Nor do they contest the District Court's finding that any commodities excluded by the container tariff are covered by other express tariffs (J.S. p. 4a).

Thus appellants' final argument presents no substantial question concerning the holding out by R E A of an express service. Obviously this holding out does not have to be made within the covers of a single tariff schedule—and this case concerns only one of many R E A tariff schedules, all of which cover service between the 35 cities here involved.

Conclusion

For the foregoing reasons this appeal presents no substantial question, probable jurisdiction should not be noted, and the judgment below should be affirmed.

RAILWAY EXPRESS AGENCY, INC.,
Appellee, by its attorney,
WILLIAM Q. KEENAN
219 East 42nd Street
New York, N. Y. 10017

October 21, 1966

Certificate of Service

I, WILLIAM Q. KEENAN, attorney for Railway Express Agency, Inc., appellee, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 21st day of October, 1966, I served copies of the foregoing document on the several parties to this appeal as follows:

(1) On New England Motor Rate Bureau, Inc., et al., appellants, by mailing copies in duly-addressed envelopes, with postage prepaid, to Peter T. Beardsley and R. Edwin Brady, Esqs., 1616 P Street, N.W., Washington, D. C. 20036; to Guy H. Postell and Frank D. Hall, Esqs., 1375 Peachtree Street, N.E., Atlanta, Georgia 30309; Bryce Rea, Jr. and Burton Fuller, Esqs., 917 Muncey Building, Washington, D. C. 20004; John W. McFadden, Esq., 316 East Ohio Street, Chicago, Illinois 60611; Harry C. Ames, Esq., Transportation Building, Washington, D. C. 20006; LeGrand A. Carlston and Z. L. Pearson, Jr., Esqs., P. O. Box 5746, Terminal Annex, Denver, Colorado 80217; J. D. Lawson and George D. Michalson, Esqs., P. O. Drawer 647, Kansas City, Missouri 64141; Roland Rice, Homer S. Carpenter, John S. Fessenden and Richard R. Sigmon, Esqs., 618 Perpetual Building, Washington, D. C. 20004.

(2) On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid to Honorable Thurgood Marshall, The Solicitor General, Department of Justice, Washington 25, D. C.; to Howard Shapiro, Esq., Anti-Trust Division, Department of Justice, Washington 25, D. C.; and to

W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U.S. Post Office & Courthouse Building, Boston 9, Massachusetts.

(3) On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Leonard Goodman, Esq., Associate General Counsel at the office of the Commission, Washington 25, D. C.

WILLIAM Q. KEENAN

APPENDIX A

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission *en banc* in Docket 33977

Commr. Tuggle: Apparently the REA was performing a superior service in the 2,000 to 3,000 pound class.

Mr. Rea: At one point I am sure it was.

Mr. Tuggle: Until the motor carriers increased their efficiency and invaded that field, and by equalizing their services with the services of REA, so you argue, that per force that forced REA down and down and down until you don't know where to stop.

Mr. Rea: It could well be, Commissioner Tuggle, that will be the answer. It could well be that REA has outlived its usefulness.

* * * *

If the Commodity A that Carrier X is certificated to haul stops moving, he goes out of business. Unfortunately his certificate doesn't enable him to invade the territory of Carrier B.

Now, if it is possible, if in fact REA is no longer able to get business in the 2,000 pound weight bracket, in express service, that is no more justification for their invading general freight service, which they are not authorized to perform, than would the face that Carrier X restricted to the haulage of Commodity A should be allowed to haul Commodity B, just because Commodity A is no longer moving.

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

Commr. Murphy: You are not comparing like to like. * * * The express company, of course, is a general commodity organization.

Mr. Rea: True.

Commr. Murphy: Do you feel this rate situation you are speaking of here, this isn't something new as far as the Express Company competing with the motor carriers, is it?

Mr. Rea: No, Your Honor, it is not something new. The Express Company is entitled to compete with motor carriers.

* * * *

That, to me, is the crux of the case, not whether REA competes with us, but whether they compete with us within the sphere of activity, within the sphere of service assigned them under the Act. * * *

Commr. Tuggle: You wouldn't accept the statement, of course, that the motor carriers were beginning to perform an express service when they improved their efficiency so that they could take traffic away from REA, which was performing an express service by doing the very same function and perhaps doing it better. You wouldn't contend that was an invasion of the express field?

Mr. Rea: I would say this, Commissioner Tuggle, no, it is not an invasion of the express.

Commr. Tuggle: What distinction do you make?

Mr. Rea: I would make the distinction the Commission itself made most recently in the Nashua Case.

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

The Commission has always intended the term "express service" to mean generally the expedited handling of small parcel traffic which common carriers of ordinary freight do not desire usually, or are not able to perform. (Tr. 1871-1874).

* * * *

Mr. Rea: I wouldn't concede that the motor carriers refused to handle small shipments. They do handle them—too many they say. But they don't give them the service because they are not geared to giving them the service that REA traditionally can, traditionally has and can give them. * * * REA can very quickly and easily establish that it is rendering a service * * * respecting small shipments which the motor carriers do not render,—whether they can or could is beside the point—they do not render it.

It is the premium service of REA in relation to the services available through the general freight carriers, and that is the crucial issue, it seems to me, in determining the limits of REA's operating authority, if you please. What is the nature of the service in relation to existing services of general freight carriers? Is it or is it not premium?

Commr. Freas: Right on that point, Mr. Rea, if I follow you correctly, you are conceding to the Railway Express Agency the right to transport shipments of this low weight area because their service is of a higher quality you say; it is a premium service compared to the highway carriers, the way I understand

you. Now my question is, assuming now that the highway carriers would elect to improve their service to make it equal to that of Railway Express Agency, will that then make the service of the Railway Express Agency today carrying on properly, illegal simply because it is no longer a premium service?

Mr. Rea: REA would not then be rendering express service.

Commr. Freas: In other words, then it makes no difference what the Railway Express does, if it is doing something that is legal today and doesn't change its practice one iota, but if its competitors improve their service so as to change the relationship from the standpoint of one being superior to the other, then it is by reason of the action of the motor carriers that a legal service becomes illegal, is that your argument?

Mr. Rea: Commissioner Freas, *I think that is necessarily the argument* because that is the basis upon which the Commission itself has differentiated express service from regular, ordinary freight service.

* * * *

Mr. Rea: Your Honor, it is quite conceivable the motor carrier service—it is conceivable, I doubt it will happen—but it is conceivable the motor carrier service could so far improve that express service would dry up altogether and the REA, absent legislative relief, would go out of business. If we reach that point—just one moment if I may—if we reach that point it may be legislation may be necessary.

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

But what I am saying under the Act as it is now written, and under the definition of "express service" as being a premium service in relation to other services, if the REA service is no different than ordinary motor carrier service, ordinary forwarder service, it ceases to be express service. We have a relative concept. (Tr. 1877-1879).

* * * *

Commr. Tuggle: * * * Assume that REA is performing an express service, say pickup and delivery, going back some time, and that is the only superiority that it has over motor carriers, but then the motor carriers begin to perform pickup and delivery, so in that particular instance REA is no longer superior, it is exactly equal. Has it forfeited its right then to continue to handle that traffic that it has been handling because the motor carrier can now do it as well as it can?

Mr. Rea: I would say, Commissioner Tuggle, yes. REA is foreclosed from holding itself out to the public to offer any service that is not superior to the general freight service available. So that whatever the general freight carriers do, REA must do more of, it must do better if it is to stay within the concept of express service.

Commr. Hutchinson: *So that express service is really a service that motor carriers do not render or are unwilling to render?*

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

Mr. Rea: It is a service that the motor carriers do not or are unwilling to or cannot feasibly render.

Commr. Hutchinson: Does the motor carrier then who does not render an express service, which I understand you to say they are authorized to render—does a motor carrier who fails to render an express service violate the terms of his certificate, or does he violate or fail in any way to meet the responsibilities that he has by virtue of the authority contained in the certificate?

Mr. Rea: No, Your Honor, the motor carrier's responsibility is to render transportation with reasonable dispatch. (Tr. 1887-1888).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., et al., and ACME FAST FREIGHT, INC., et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

The National Small Shipments Traffic Conference, Inc.
Drug and Toilet Preparation Traffic Conference
Eastern Industrial Traffic League, Inc.

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October 24, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., et al., and ACME FAST FREIGHT, INC., et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, The National Small Shipments Traffic Conference, Inc., the Drug and Toilet Preparation Traffic Conference, and the Eastern Industrial Traffic League, Inc., intervenors in the district court proceeding below, move that the judgment of the district court be affirmed.

Statement

This is a direct appeal from a judgment (JS 1a) of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Com-

mission entered in *Freight All Kinds, L.C.L., Container Charges—U.S.A.*, 323 I.C.C. 468 (1964). The Commission approved as just, reasonable and otherwise lawful tariffs of Railway Express Agency, Inc. (R E A), effective January 12, 1962, publishing charges for the transportation of all types of commodities, in straight or mixed shipments, maximum weight 3,000 pounds, when loaded by the shipper prior to tender into a container of 101 cubic foot capacity. A few commodities, of unusual character, are excluded from application of this particular rate schedule.

The three shipper leagues participated in the Commission proceeding and submitted evidence on behalf of a large cross-section of the shipping public. Shipper testimony before the Commission uniformly supported the R E A tariff on the ground that it represents a laudable approach to solution of what is termed in the transportation industry, "the small shipments problem". Shippers of less-truckload freight in small lots frequently find that their traffic is not favored by motor common carriers who have been markedly antipathetic to improvements in this realm —preferring, judging by the record, simply to increase the price of service by imposing surcharges and rate additives on small shipments, in lieu of seeking out technological offsets to higher costs. For this reason, shippers favored R E A's effort to apply, by this tariff, the results of technological improvement, and to reflect in this rate structure the reduced carrier expense of single container handling as opposed to multiple handling of loose packages.

Heretofore technological innovation in transportation has been directed to carload and truckload freight,

as in the various piggyback plans. R E A has by this tariff applied the containerization principle of piggyback to the small shipment sector. The shipping public desires the continuance of these rates because the tariff in issue is the *only* such tariff offered the small shipment public.

Argument

Shippers constituting the membership of the intervening leagues make extensive use both of motor carrier service and express service. Their interest is in a healthy motor carrier industry as well as a viable express system. To the shipper community, the issue raised by appellants has the aspect of one branch of the transportation system seeking to exclude another from small shipment transportation. Citing neither statute nor regulatory policy that would mandate such result, motor carrier appellants contend for total immunity from express competition in the small shipments market. They would relegate R E A exclusively to the carriage of those shipments which motor carriers do not care to handle. As noted in the Commission's report (JS 17a), express service was described at oral argument by counsel for motor carrier protestants as "a service that the motor carriers do not or are unwilling to or cannot feasibly render". From any viewpoint—regulatory, economic, or legal—such definition of express service is palpably unsound. The Commission so held, stating:

> "We are unable to reach [this] conclusion either as a matter of certificate interpretation or in compliance with our obligation to promote the objectives of the national transportation policy" (JS 26a).

Where, as here, an economic enclave is sought to insulate one sector of an industry from the competition of another, and neither policy nor statute so dictates, it is difficult indeed to see that a substantial question is raised.

The secondary thrust of appellant's argument is that the instant tariff does not fully comply with the *Arrowhead* criteria enunciated by the Commission, in that certain commodities are excluded from the tariff and that the tariff provides for a "lower grade of service at cheaper rates" (JS 4).

No shipper testifying before the Commission complained of the exclusion from the container tariff of: live creatures, articles requiring protection from heat or cold, human remains, or articles named in R E A's money classification. No evidence was presented by any party indicating that R E A does not in fact have tariffs filed under which it will carry such traffic. The motor carriers are in effect arguing that an express company may have only one rate structure which must in itself encompass all the different services provided. The fifth of the *Arrowhead* criteria rebuts this proposition. It provides that an express carrier must

> ". . . use relatively simple billing, rate *structures,* and rate *publications* whereby the rates and charges for the *services* offered and performed may easily be determined with a minimum of delay" (JS 21a). (emphasis added).

Reference to "rate structures", "rate publications" and "services" renders insubstantial the contention that an express company must publish rates appli-

cable to *all* the commodities which it carries under a single structure of charges; so long as it does in fact hold itself out to carry "any commodity which may be safely transported in ordinary van type equipment" it is immaterial whether it does so in one tariff or under one rate structure or by a number of them.

Nor is substantial question raised by the argument of appellants that R E A may not "maintain a lower grade of service at cheaper rates" Such contention implies that R E A must charge the same rate for a shipment which does not require, for example, armed guard accompaniment, or refrigeration in transit, as it does for a shipment not requiring such treatment. R E A has historically offered different grades of service dependent upon the transportation requirements of the traffic. Indeed, it would have priced itself out of business long ago had it not also charged differing rates for these grades of service. The third criterion of the *Arrowhead* case requires only that in rendering its various services R E A must

> * * * provide equally expeditious transportation and careful handling of all accepted shipments, regardless of their volume, special demands or value, from the point of pickup to the point of delivery.

The commission found that R E A's carriage of containerized traffic fully satisfied this requirement (JS 22a).

Conclusion

The Commission noted that the *Arrowhead* criteria "are practical and concrete requirements intended for the guidance of carriers engaged in express service to

assure that it remains bona fide". It interpreted REA's highway certificates as requiring adherence to such criteria, and found that the instant tariff was within the authority of an express carrier to publish. It thus once again affirmed the principle that an express company may maintain rates applying "to any character of traffic regardless of weight, size or description, subject to the ability of the express company to handle traffic in available equipment", which was enunciated in 1934 in *American Highway Freight Association* v. *Southeastern Express Company*, 201 I.C.C. 175, and in 1945 in *Express Rates From, To and Between Points in the South*, 262 I.C.C. 1.

It is respectfully submitted that none of the questions raised by appellants' Jurisdictional Statement is sufficiently substantial to warrant plenary consideration by this Court. The judgment of the district court should be affirmed.

Respectfully submitted,

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October 24, 1966

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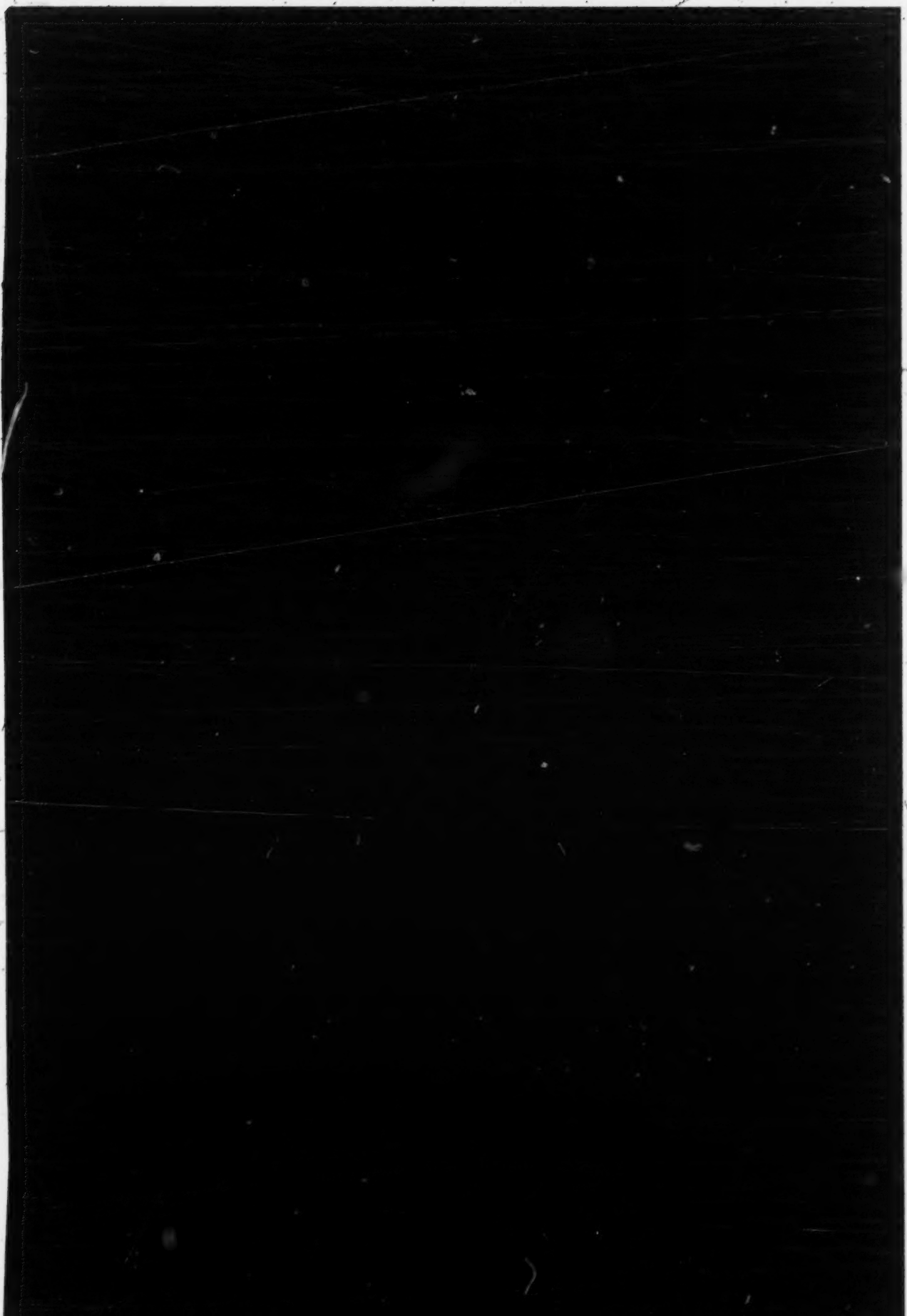

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S. App. A; 254 F. Supp. 633) dismissing appellants' suit to set aside an order (J.S. App. B; 323 I.C.C. 468) of the Interstate Commerce Commission approving a schedule of reduced rates filed by Railway Express Agency, Inc. ("REA") for

236-057—66——1

express service between 35 stated cities. This service involves the relatively low-cost transportation of a wire mesh container of a fixed capacity which a shipper may load with any number of articles so long as the total weight does not exceed 3000 pounds. Appellants are representatives of motor freight carriers and freight forwarders. The question involved is whether REA's use of containers is within its authority as an express carrier.

REA carries express shipments by rail and motor vehicle. Although it handles shipments ranging from about 20 pounds to carloads, its principal traffic consists of small shipments averaging about 50 pounds (J.S. 11a, 24a). Because REA's traffic was disproportionately composed of small shipments which resulted in lower load levels and higher costs as compared to its competitors, who carry larger average shipments, REA's rate structure was generally higher than other motor carriers.[1] As competition from motor carriers and freight forwarders increased, its comparatively higher rate structure and its reputation as a high-rate carrier caused it to lose substantial less-than-carload traffic (J.S. 24a). Faced with financial losses, REA revamped its operations and began to use containers in an attempt to regain some of this business (J.A. 13a).

REA urged before the Commission that by encouraging large volume shippers to tender their shipments in containers, rather than to ship in individual pieces, it could provide the same expedited service

[1] REA's rates were also somewhat higher than competing carriers' due to the somewhat higher costs usually associated with express service (J.S. 5a).

it had always furnished, pass on the savings in its operating costs for this type of service to the shipper in the form of lower rates, and remain competitive. After full administrative proceedings, the Commission approved REA's reduced rates.

The Commission rejected its examiner's determination that REA was not authorized to perform the proposed service. It held that the use of containers is within the firm's authority as an express company. Applying the criteria for bona fide express service which it had set forth nine years earlier,[2] the Com-

[2] In *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 581–82 (1955), decided upon the remand of *Arrowhead Freight Lines* v. *United States*, 114 F. Supp. 804 (S.D. Calif. 1953), the Commission held that:

> * * * [T]he rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay.

mission found that REA was authorized to carry container traffic in express service.

The Commission's decision was affirmed unanimously by the district court (J.S. App. A).[3] The court below specifically analyzed each of the Commission's definitional criteria for express service as applied to REA's service by use of containers and concluded that the Commission properly approved the reduced rates (J.S. 2a–5a). In addition, the court rejected appellants' contention that express service must involve premium rates. So long as REA's container rates are compensatory, the court held, there is nothing in the historical definition of express service which obliges REA to charge premium rates.[4]

ARGUMENT

This appeal presents no question warranting plenary consideration by this Court. The Commission's determination concerning REA's use of containers is a reasonable application to the facts of this case of the standards and the policies earlier established for express service.[5] Determination of the nature and

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[3] The container rates approved by the Commission and upheld by the court have been in effect since 1962.

[4] REA's container rates were found by the examiner and the Commission to be compensatory (J.S. 14a, 49a).

[5] See *Arrowhead Freight Lines*, *supra*, note 2. As noted by the court below, what appellants' case "really boils down to is that they would add a sixth factor" to the five criteria for express service set out by the Commission in *Arrowhead Freight Lines*—that express service must involve premium rates (J.S. 5a). On this point, the court below stated: "Rates, however, are only a result of the costs involved in transporting the commodities. If a premium charge is a frequent manifestation of express service, it is not an inevitable one (*ibid.*).

limits of express service is a matter committed by Congress to the Commission. Its factual determination, upheld by the court below, that the service involved here is an express service is entitled to great weight. There is nothing in its resolution of this factual question that presents an issue for this Court.

Appellants contend that this service violates congressional policy against unlimited entry of railroads into the motor carrier field (J.S. 8–9, 12). But there has been no such enlargement of REA's authority to render service in this case. And no such incursion could properly be said to result so long as REA is not offering a lower-grade, non-express service by using containers. Certainly there is, on the present record, no factual or legal justification for limiting REA to a small-package operation when large packages can and historically have moved in express service.[6] Nor is there any reason to require express companies to charge premium rates, so long as their rates are compensatory.

The Commission's decision enhances competition between express companies and motor carriers, results in improved service and lower rates to shippers, and conforms with the National Transportation Policy (49 U.S.C. preceding § 1). Motor carriers have no right to be insulated from all rate competition from express companies. Each mode of transportation service is entitled to assert its cost and service advan-

[6] Compare *Eastern Express, Inc.* v. *United States*, 369 U.S. 37, affirming per curiam 198 F. Supp. 256 (S.D. Ind.), where appellant motor carriers unsuccessfully attempted to limit appellant freight forwarders to small package shipments.

tages in fair competition against other modes of transportation service. Cf. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744. It is no objection that REA's use of containers will enable it to compete more actively for larger *express* shipments; that is precisely the type of inter-modal competition which Congress hoped would take place.[7]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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[7] A few categories of commodities which are plainly unsuited for containerized transportation (*e.g.*, live animals, human remains, goods requiring refrigeration or insulation from heat) are for this reason excluded from REA's reduced rates (J.S. 8a, 22a). Exclusion of a few commodities, for obvious reasons, hardly makes the carriage of the included commodities any less an express service, so long as the other requisites are met. And, as noted by the court below (J.S. 4a), REA provides express service under other tariffs at higher rates for all commodities so excluded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NEW ENGLAND MOTOR RATE BUREAU, INC., *et al.*,
Appellants

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts

REPLY OF APPELLANTS TO MOTIONS TO AFFIRM

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On Appeal From the United States District Court for the District of Massachusetts

REPLY OF APPELLANTS TO MOTIONS TO AFFIRM

PREFATORY STATEMENT

In the course of lengthy administrative proceedings involving numerous lawyers and successive submissions of argumentative pleadings,[1] many contentions are vig-

[1] In the proceedings before the Commission, 27 lawyers entered their appearances for one or more protestants. At the conclusion of the hearings, the Examiner himself heard oral argument, subsequent to which briefs were filed. Thereafter, exceptions to the recommended report of the Examiner were filed and replies to exceptions were filed, following which oral argument before the entire Commission took place.

orously urged, some of which are without merit and some of no dispositive significance any way. It is, therefore, no answer to contentions seriously pressed at this stage of this long litigation that the appellants, or some of them, have in the past urged matters which are not now before this Court. Thus, it is neither accurate nor fair to allege, as has the Railway Express Agency,[2] that these appellants insist that Express service (1) refers to a particular type and size of shipment, (2) requires a rate higher than that charged by appellants, and (3) prohibits the provision of any service provided by any of the appellants.

By the same token, it is hardly helpful to the Court to suggest, as did the government,[3] that the appellants object to the use by the Railway Express Agency "of containers which will enable it to compete more actively for larger express shipments," or to suggest, as did the Small Shipments people,[4] that their purpose is to prevent the agency from providing a small shipment service in the most economic manner possible.

Finally, we especially resent, as should the Court, the macabre statement at page 16 of the motion of Railway Express Agency, that "appellants particularly object to the commodity exclusions in the container tariff, *e.g.*, human remains."

None of the foregoing diversionary representations really faced up to the focal contentions upon which appellants here rely. We have told the Court, first, that the Commission has unlawfully adopted and is

---

[2] Pages 6 and 7 of its motion.

[3] Page 6 of its motion.

[4] Pages 2 and 3 of the motion of the National Small Shipments Traffic Conference, et al.

presently applying different definitions of express service in differing types of cases. We say, second, that an express company may not lawfully so condition its holding out to transport at a reduced rate as to exclude from that particular service those commodities which are expensive to transport and which are the express obligation of the express company to accept and carry. And we say, third, that an express company cannot qualify to engage in freight service by mere fact that it also holds out and performs an express service at other and higher rates.

The remaining two points on which we especially rely are that, as a result of the failure of the Interstate Commerce Commission to limit the Railway Express Agency to the provision of a true express service, two serious and destructive violations of law and Congressional policy will ensue. First, there will be created a nation-wide freight carrier with motor carrier operating authority which has never met the statutory standard of public convenience and necessity, and, second, the Congressional policy against entry of the railroads into the field of motor carrier transportation will be frustrated.[5]

To the extent, and it is minor, that appellees have directed their motions to the foregoing five basic contentions, we answer below.

---

[5] The decision represents a complete reversal of the policy articulated in *Rock Island Motor Transit Co.—Purchase—White Line Motor Freight*, 40 M.C.C. 457, 473-74 (1946), aff'd on further hearing, 55 M.C.C. 567 (1949), that a railroad applicant for motor-carrier authority must not only prove as any other applicant that the service is required by the public convenience and necessity, but also has a "special burden" to establish that special circumstances negative any disadvantage to the public flowing from the railroad control.

THE DIVERSE DEFINITIONS

The principal foundation upon which appellants rest their case is that the Commission has in this case changed its definition of express service. The absence of any comment on that point by either the government or the Small Shipments people is itself most eloquent. It is also understandable when attention is given to the effort of Railway Express to cope with that phase of the case.

Commencing at page 9 of its motion, Railway Express denies that different definitions have been applied, saying that in the licensing cases all the Commission was talking about was "the practical scope" of the operations which Railway Express might be expected to institute once the authorization had been granted. About the only thing good that can be said of that argument is that it is ingenious because the fact is that it cannot be squared with what the Commission itself, in solemn language said it was to do. A typical example of such categorical expression by the Commission was quoted by us at page 6 of our jurisdictional statement. For convenience we reproduce it below:

> "* * * [P]rotestants * * * have given expression * * * to considerable apprehension that the Commission in granting authority to REA is giving birth to a nationwide railroad-controlled motor carrier which would be fully competitive with general freight carriers, * * *.
>
> "* * * Protestants may rest assured, * * *, that we shall continue to scrutinize REA's operations with a view to forestalling any developments which threaten to change the character of the services provided by it to the serious detriment of other carriers. * * *"[6]

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[6] *Railway Express Agency, Inc., Extension—Charlottesville,* 94 M.C.C. 62 (1963), at pages 76 and 77.

Similar expressions by the Commission in other operating rights cases were cited at page 11 of our jurisdictional statement. Our entire point is that the Commission *has* in this case changed the definition of express service from what it had said that service to be in the operating rights cases. That change has had the effect of eliminating the very restriction which the Commission had assured the motor-carrier industry would be preserved and enforced.

In a further effort to divert the thrust of our argument, Railway Express says that even if the Commission *has* changed its view of what constitutes express service, no invalidity of the present definition is thereby demonstrated. Cited are *Ace Lines Inc.* v. *United States,* 197 F. Supp. 591 (1960) and a long list of other cases assertedly holding that the Court ought not to concern itself with a lack of consistency in the Commission's own decisions.

The cited cases generally fall into three categories: those where the court held that the rule of *stare decisis* does not apply to administrative agencies; those where the agency reached its different conclusion on the basis of different facts and after a clarifying Supreme Court decision (*National Labor Relations Board* v. *Baltimore Transit Co.,* 140 F. 2d 51 (1944)); and those where the agency was applying a newly established policy to license renewal (*Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244 (1947), *WOKO, Inc.* v. *Federal Communications Commission,* 153 F. 2d 623 (1946)). Most of the cases cited involved alleged inconsistencies occurring between unrelated decisions, that is, contentions that the administrative agency has treated different parties differently even though the factual situations were similar.

The three cases involving agency departures from prior holdings on the same subject are distinguishable from the instant proceeding. In the *Baltimore Transit* case, the National Labor Relations Board had administratively declined to take action on an earlier complaint of the union apparently on the ground that the National Labor Relations Act was not applicable. There was no adjudication by the Board on the question of jurisdiction or any other issue. The Court held that the Board was not precluded by this "administrative determination not to take action" from taking action at a later date, upon a new complaint and a different state of facts, when its jurisdiction had been made clear by intervening decisions of the Supreme Court and it appeared that the Act was being violated. In the *Churchill Tabernacle* case, the Federal Communications Commission had approved a contract of sale of a radio station from the church to a separately organized corporation and had issued renewal licenses to the station. The contract of sale reserved certain broadcast time to the church and contained a reverter provision. In the subsequent license renewal proceeding, the Commission concluded that the contract provisions made the renewal of the license contrary to the public interest. The Court held that the Commission's power to establish and apply to renewal applications new policies inconsistent with its prior decisions flows from the Commission's statutory duty to examine each application for renewal as an original proceeding to be determined on the basis of the public interest. This case is distinguishable from the instant situation where the Interstate Commerce Commission granted certificates authorizing a particular service without limitation to a specified term and subsequently in an unrelated pro-

ceeding, rendered a decision which effectively enlarged the operating authority without complying with the specific requirements of the Act. In *Coyle Lines* v. *United States,* 115 F. Supp. 272 (1953), the Court held that apparently inconsistent findings in an unrelated proceeding are not sufficient to overturn an agency order supported by substantial evidence in the record as a whole.

All of the cases cited by Railway Express are clearly distinguishable from the situation here before the Court where the motor carriers have been told in litigation against Railway Express that no operating authority issued to Railway Express will ever be used in competition with the motor carriers and, now in this case, that it will. Indeed, the creation of competition is one of the very bases upon which the government seeks to defend the Commission's decision, as is plain from page 5 of the government motion which reads in part as follows:

> "The Commission's decision *enhances competition* between express companies and motor carriers, results in improved service and lower rates to shippers, and conforms with the national transportation policy. (49 U.S.C. preceding § 1)" (Emphasis supplied)

The Commission may not so cavalierly tailor its decisions to fit its changing moods, especially with regard to interpretations which eliminate restrictions from certificates of operating authority. As the Court said in *Movers Conference of America, et al.,* v. *United States,* 205 F. Supp. 82, 86 (1962):

> "We conclude that the proposed order does redefine 'household goods' in a manner different from the existing definition commonly accepted

> within the industry by both the carriers and the Commission. In our opinion, the proposed redefinition narrows the term 'household goods,' excluding certain types of services previously thought to be contained within the meaning of the words involved. Since the Commission proposes to do this by a procedure other than that set forth in 49 U.S.C.A. § 312(a), the order is clearly erroneous in that it constitutes a deprivation of the rights of the household goods carriers without proper process of law. For that reason, the Interstate Commerce Commission is hereby enjoined from enforcing its order * * *."

THE RESTRICTED RATES

Although Railway Express and the Small Shipments people submitted arguments in opposition to our contention that the rates here at issue may not lawfully be restricted to exclude therefrom items which are expensive to transport, notably articles which require protection from excessive cold or heat, the government has declined to face up to the proposition. It is interesting to note, however, that the government urges in its contention that there has been no incursion by REA into the field of motor carrier transportation of freight, that "no such incursion could purposely be said to result so long as REA is not offering a lower-grade, non-express service by using containers."[7] The Small Shipments people argue precisely the contrary at page 5 of their brief where they say that REA has historically offered different grades of service at different rates and ought not to be foreclosed from maintaining a lower grade of service at cheaper rates.

To these appellants it seems ridiculous for REA and the Small Shipments people to be urging that there

[7] Page 5 of the Government's motion.

has been no departure in this instance from an express service and therefore no incursion by REA into the field of motor transportation of freight. The government itself endeavors to defend the Commission's decisions upon the ground that it "enhances" competition between express companies and motor carriers.[8] To say, as does REA at page 13, that this incursion is with respect to only a small amount of traffic is no answer at all. The Commission gave positive assurance to the motor carriers in the operating rights cases that there was to be no such incursion—and it issued certificates of operating authority to carry out that intent. Yet the fact remains that in this case it has permitted REA to publish and maintain rates which are on or below the level of the freight rates of the motor carriers and it has permitted Railway Express to condition those rates by the tariffs publishing them so as to make them inapplicable to the very type of shipment which is embraced within the third criterion of express service quoted by the government in footnote 2 on page 3 of the government motion. That third criterion requires an express company "to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from point of pick up to the point of delivery, * * *." If Railway Express is free to publish a special low rate applicable only for a described service which categorically relieves the express company from the necessity for giving "equally * * * careful handling" to the shipments moving therein as is given to shipment moving in *another* described service of Railway Express, then that agency is free to provide a freight service so long as it also provides an express service. This is precisely what the

[8] Page 5 of the Government's motion.

Commission said an express company could *not* do in the *Arrowhead* case[9] cited by the government as controlling in footnote 2 on page 3 of its motion.

FREIGHT AND EXPRESS, OR JUST EXPRESS?

In the final analysis, the Commission originally held that the container service is a lawful service by Railway Express Agency so long as the agency continues to perform the traditional type of express service that has become so familiar. Also in the final analysis the decision of the court below sustained the Commission on this finding because, said the court, Railway Express "holds itself out to transport the excepted items under its other tariffs."[10] The Small Shipments people would dismiss the argument by the tenuous observation that the fifth criterion intimates that there can be more than one structure of express rates and Railway Express avoids the argument by quoting the language of the court below. The short answer to both arguments, of course, is that in the *Arrowhead* case the Commission condemned the freight service even though Arrowhead had continued and was actually operating an express service at the same time. If that case controls this one as the court below and the Commission have both found, then the wrong result has obviously been reached.

THE SUBSTANTIAL QUESTION

Railway Express and the Small Shipments people all urge that this appeal presents no substantial question. Yet the government itself says that the Commission's decision is designed to *enhance* competition between the motor carriers and Railway Express. In-

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[9] Transportation Activities of Arrowhead Freight Lines, 61 M.C.C. 131 (1952), 63 M.C.C. 573 (1955).

[10] Jurisdictional Statement, page 4a.

asmuch as the tariff publication which describes the service to be rendered removes it from the category of express service, the competition which results is for freight. Not only is this competition contrary to the oft-expressed policy of Congress that there is to be no invasion by the railroads into the field of motor transportation but also it is an abrogation of a solemn assurance that was made by the Commission to the protesting motor carriers when it granted to Railway Express the authority to provide an *express service* over the public highways by its own motor vehicles. In this case the issues are so substantial as not only to justify plenary review by the court but also to demand it.

To sum up, the Commission quieted the fears of the independent motor carriers in the operating rights cases by assuring them that although its grants of authority put REA in the motor-carrier business, such grants, being limited to the performance of an *express service,* in no way threatened the ability of the independents to continue to perform *freight* service. Having accepted this assurance in good faith, the independent motor carriers are now faced—despite the Commission's earlier pronouncement—with the most vigorous competition by REA in the field of *freight service.* If this competition resulted from their unwillingness or inability to render an adequate freight service, the independent carriers could have no legitimate complaint, *American Trucking Associations, Inc.* v. *United States,* 355 U.S. 141 (1957), because the shipping public is entitled to such service. But the Commission has found no inadequacy in the *freight* service rendered by the independents. Rather, it has allowed REA to invade that field by the back door by holding that any transportation performed by REA's is "express service," regardless of the nature of the service actually rendered or the consist of the freight

involved. If the independent motor carriers are to be faced with the competition of REA in the field of general freight transportation, surely they have the right to assume that the Commission would not permit nationwide operations by this railroad subsidiary, except, at the least, upon the same showing that the Interstate Commerce Act imposes upon any motor carrier seeking to extend its operating authority, i.e., proof of public convenience and necessity. Yet, REA has never met this test. There has been no need for it to do so. The Commission's construction of its existing certificates, the language of which limits its operations to the transportation of traffic moving in "express service," has obviated any such need. This is a windfall bestowed by the Commission which has no counterpart in transportation history, and which violates the specific requirements of the statute which it administers.

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